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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - - - Petitioner

versus

JAMES H. BROWN III - - - - - Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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[redacted]

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The petitioner prays that a writ of certiorari issue to review the appellate order of the United States Court of Appeals for the Sixth Circuit rendered October 31, 1980.

THE QUESTION PRESENTED FOR REVIEW

Did Dismissal by the Supreme Court of Kentucky of Respondent's State-Court Appeal, Pursuant to Procedural Rule Which Operated Upon His Appellate Counsel's Default, Violate Any Part of the Constitution of the United States of America?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of the case before this Court.

TABLE OF CONTENTS

	PAGE
The Question Presented For Review	i
Reference To Opinions	1– 2
Statement of Jurisdiction	2– 3
Constitutional Provisions Involved	3
Statement of the Case	3– 8
Argument And Reasons For Granting The Writ of Certiorari	9–24
Conclusion	24
Proof of Service	25
Appendix	27–48

TABLE OF AUTHORITIES

Cases:

PAGE

Anders v. California, 386 U. S. 738 (1967) 21, 22
Beasley v. United States, 491 F. 2d 687 (6th Cir., 1974) 13
Brown v. Commonwealth, Ky., 555 S. W. 2d 252 (1977) 4
Carroll v. United States, 354 U. S. 394, 400-401, n. 9 (1957) 12, 13
Cleaver v. Bordenkircher, ____ F. 2d ____ (6th Cir. 1980, No. 79-3514 ..... 1, 8, 17, 18, 19, 20
Cleaver v. Commonwealth, Ky., 569 S. W. 2d 166 (1978) 11
Douglas v. California, 372 U. S. 353 (1963) 16, 17
Francis v. Henderson, 425 U. S. 536 (1976) 3, 23
Gideon v. Wainwright, 372 U. S. 335 (1963) 13
Griffiin v. Illinois, 351 U. S. 12 (1956) 16, 17
Hoy v. Newburg Homes, Inc., Ky., 325 S. W. 2d 301, 302 (1959) 14
Lucey v. Seabold, No. 79-3752 19
Mallett v. North Carolina, 181 U. S. 589, 598 (1901). 21
McKane v. Durston, 153 U. S. 684 (1894) 3, 10–11, 12, 13, 14, 15, 17, 23
Ross v. Moffitt, 417 U. S. 600 (1974) 3, 12, 13, 14, 16, 17, 21, 22, 23
Wainwright v. Sykes, 433 U. S. 72 (1977) 23
Williams v. Payne, Ky., 515 S. W. 2d 618, 619 (1974) 11

Constitutional Provisions (U.S.):

Sixth Amendment, Constitution of the United States 3, 13
Tenth Amendment, Constitution of the United States 3, 11
Fourteenth Amendment, Constitution of the United States 3, 13, 23

Statutes and Rules:

PAGE

28 U.S.C. § 1254(1) 2

Rules 17.1(a) and (c), Supreme Court of the United States 2, 3, 24

Rule 16.1, Supreme Court of the United States... 3, 9, 23

Rule 33.7, Supreme Court of the United States... 3, 9, 23

Rule 31(c), Federal Rules of Appellate Procedure. 3, 9, 23

28 U.S.C. § 2254 4

Other:

Sections 115-116, Kentucky Constitution 6, 11, 15

(Ky.) R Cr 11.42 5

(Ky.) CR 76.34(6) 11

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - - *Petitioner*

v.

JAMES H. BROWN III - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER, WITH APPENDIX

REFERENCE TO OPINIONS

Decision herein by the United States Court of Appeals for the Sixth Circuit was by a three-paragraph order of October 31, 1980, entered the same date, and styled James H. Brown III v. Steve Smith, Superintendent, Kentucky State Reformatory, No. 79-3589. The order refers for affirmance to that court's decision rendered the same day in Cleaver v. Bordenkircher, —— F. 2d —— (6th Cir. 1980, No. 79-3514). These reports may be found at Appendix 27, 28-33. The order and judgment of the United States District Court for the Eastern District of Kentucky, reviewed on appeal to the Court of Appeals, were filed June 25, 1979, entered June 27, 1979, and may be found at Appendix

34-36. The magistrate's memorandum opinion of September 5, 1978, and his report and recommendation of September 25, 1978, which were adopted in full by the District Court order above set forth, may be found at Appendix 37-43.

STATEMENT OF JURISDICTION

The filing and entry date of the appellate order of the United States Court of Appeals for the Sixth Circuit of which review is sought in this Court is October 31, 1980. The appellate order resulted from a civil appeal from a habeas corpus proceeding in the District Court.

No rehearing was sought by any party.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate order in question by 28 U.S.C. § 1254(1).

This Court should grant the writ of certiorari under the authority of Rules 17.1(a) and (c) of this Court.

Rule 17.1(a). The Sixth Circuit has decided a federal question in a way in conflict with the Supreme Court of Kentucky, a court of last resort, thereby casting doubt on the Kentucky court's Constitutional ability to dismiss Kentucky appeals based upon appellate counsel's procedural default. In so doing, the federal court of appeals has so departed from this Court's opinion authority regarding state-court appeals, and from its rule authority, and from its principles of comity and federalism as to call for this Court's supervision to resolve and restore its Constitutional authority.

Rule 17.1(c). The Sixth Circuit has decided a nationally important question involving state-court power over state-court appeals procedures in a way in direct conflict with *McKane* v. *Durston,* 153 U. S. 684 (1894), *Ross* v. *Moffitt,* 417 U. S. 600 (1974), and *Francis* v. *Henderson,* 425 U. S. 536 (1976), and the principles embodied in Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Circuit Courts. This Court should settle such challenge to its authority and to the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that there is no Constitutional authority to justify the result of the courts below. Such absence of authority involves reference to

The Sixth Amendment, Constitution of the United States

The Tenth Amendment, Constitution of the United States

The Fourteenth Amendment, Constitution of the United States

Rules 16.1 and 33.7, Supreme Court of the United States

Rule 31(c), Federal Rules of Appellate Procedure.

The full text of this authority is set forth at Appendix, pp. 45-48.

STATEMENT OF THE CASE

References herein will be to either the Joint Appendix of the parties as filed in the Court of Appeals and which presently is not before this Court (JA), or

to the Appendix of opinions and reports which accompanies this petition (A). Respondent invoked federal jurisdiction under 28 U.S.C. § 2254 in the District Court (A 38).

Respondent James H. Brown III was convicted of murder in Mason (Ky.) Circuit Court following a jury trial at which he did not testify, the final judgment of conviction coming on October 15, 1976 (JA 7). Respondent had been indicted with his brother, and the report of his brother's separate conviction and appeal may be found at *Brown* v. *Commonwealth,* Ky., 555 S. W. 2d 252 (1977) (JA 7).

Respondent timely filed a notice of appeal from his murder conviction, and the record on appeal was timely filed in the Supreme Court of Kentucky (JA 7). Thereafter, on March 16, 1977, respondent timely sought and received from the Supreme Court of Kentucky a 30-day extension of time to file his brief on appeal (JA 7). Respondent cited appellate counsel's press of work in seeking the extension (JA 8). The grant was in the form of a "FINAL EXTENSION" (JA 34). On the last timely day of that extended period, respondent did not file his appellate brief. Instead, he requested another extension of time (JA 9-10).

This last request for extra time was denied, as were subsequent motions by respondent for reconsideration (JA 14-16). On May 2, 1977, respondent tendered an 85-page brief to the Supreme Court of Kentucky (JA 12). That court dismissed respondent's appeal on October 5, 1977, in response to a motion by the Common-

wealth of Kentucky (JA 16). Respondent's appellate counsel in this period was appointed.

Respondent filed his petition for writ of habeas corpus in the United States District Court for the Eastern District of Kentucky on October 31, 1977 (JA 1). Respondent's petition claimed that he was being held unlawfully in Kentucky on two grounds. They were "denial of equal protection in prosecuting appeal guaranteed by § 115 of the Kentucky Constitution," and "denial of due process and ineffective assistance of counsel on appeal" (JA 4; A 38).

At no time in any federal court has respondent ever asserted a Constitutional deprivation at his state-court trial for murder.

The District Court found that state remedies had not been exhausted, but nevertheless held the action on its docket, and respondent reentered Mason (Ky.) Circuit Court seeking a belated appeal under (Ky.) RCr 11.42 (JA 59, 61). The relief was granted by the circuit court (JA 61).

Respondent again appealed his murder conviction to the Supreme Court of Kentucky, and this time he timely filed his appeal brief in that court (JA 62, 75). Respondent's second brief in the Supreme Court was 46 pages in length (JA 109). He did not allege prejudice by filing a much shorter brief than his first one of 85 pages, nor did he seek leave to file a longer brief.

On August 22, 1978, the Supreme Court of Kentucky, upon its own motion, again dismissed respondent's appeal (JA 73).

Respondent thereupon reentered District Court. That court's magistrate, without an evidentiary hearing, determined that a convicted state defendant has the right under the United States Constitution to effective assistance of appellate counsel on state-court appeal. The magistrate determined that the critical question was whether, due to the ineffectiveness of appellate counsel, respondent had been denied the right to an appeal under § 115 of the Kentucky Constitution. The magistrate determined that Section 115, Kentucky Constitution, provides every convicted defendant the right of appellate review of his conviction (A 37-43).

Petitioner objected to the magistrate's report, asserting that appeal under §§ 115-116 of the Kentucky Constitution is not absolute but is conditional and limited and must be taken according to mandated rules, or be lost. Petitioner objected that there is no federal due process right to effective assistance of appellate as opposed to trial counsel, and that there was no equal protection violation in regard to the dismissal of respondent's appeal.

Petitioner further objected that respondent's appellate counsel had not been shown to be ineffective, and sought an evidentiary hearing on this matter. Petitioner objected that he had no power over the Supreme Court of Kentucky and could not force that court to reinstate respondent's appeal, that respondent nowhere in District Court had ever attacked his trial conviction — as opposed to his appellate default — as violative of a Constitutional right and that since the trial judgment stood valid, with a written record

thereof, a new trial was not jurisdictionally possible. Finally, petitioner objected that it is wrong for United States courts to disallow state courts the use of their rules of appeal dismissal when those United States courts continue to have use of the same rules of appeal dismissal (JA 84-93).

On June 25, 1979, the District Court adopted in full the magistrate's report and recommendation and ordered respondent's release, on due process grounds, subject to the conditions of granting respondent either another trial or a third attempt at appeal. The District Court determined that respondent had the Constitutional right to effective assistance of appellate counsel on his Kentucky appeal, and that such right was violated when the Supreme Court of Kentucky dismissed the appeal when respondent's brief was not timely filed (A 34-36; A 37-43).

Petitioner appealed to the Sixth Circuit. On September 4, 1979 (JA 107), the District Court ordered respondent released on bail pending that appeal. In so doing, the District Court stated that it had issued the writ of habeas corpus "not because there was any finding of insufficient evidence to sustain the conviction, but because of errors of counsel, that is, the appeal (brief) was not timely filed" (JA 116).

Petitioner's appeal to the Sixth Circuit asserted that dismissal of respondent's state-court appeal, pursuant to procedural rule which operated upon his appellate counsel's default, violated no Constitutional right owing to respondent, including a right to effective assistance of appellate counsel. Petitioner also as-

serted, in any event, that respondent's appellate counsel was not ineffective, even when measured by standards applicable to trial counsel, and that at most he was chargeable only with an error of judgment.

The Sixth Circuit rendered its appellate decision on October 31, 1980 (A 27). The District Court's judgment was affirmed on the basis of the Sixth Circuit opinion in *Cleaver* v. *Bordenkircher*, ___ F. 2d ___ (6th Cir. 1980, No. 79-3514), decided the same day (A 27). The Sixth Circuit found the issue in the two cases to be identical. However, the Sixth Circuit did not set out any facts whatsoever in its decision in the present case. Nor did the Sixth Circuit address the District Court's conclusion that respondent is entitled to effective assistance of appellate counsel on state-court appeal and that appellate counsel's ineffectiveness denied him his right to state-court appeal (A 27).

The Sixth Circuit concluded its *Cleaver* opinion by stating:

> In the District Court in our present case, the District Judge relied primarily upon a due process analysis based on denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *. (A 33)

The District Court in the present case also used a due process analysis.

By order entered December 2, 1980, the Sixth Circuit stayed the mandate in the present case, pending application for writ of certiorari in this Court (A 44).

ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

Dismissal by the Supreme Court of Kentucky of Respondent's State-Court Appeal, Pursuant to Procedural Rule Which Operated Upon His Appellate Counsel's Default, Violated No Part of the Constitution of the United States of America.

The Constitutional question which this Court should accept and resolve is whether state courts may dismiss appeals from state criminal convictions, based upon defaults of procedural rules by appellate counsel. In Kentucky, such dismissal is approved by the Commonwealth's Constitution, by procedural rule, and by decision of the Supreme Court of Kentucky.

United States habeas corpus courts below, however, have determined that such dismissal by the Supreme Court of Kentucky violates the Constitution of the United States, even though federal appellate courts themselves may dismiss appeals in their own jurisdiction under the same and similar circumstances without violating the Constitution. Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Federal Rules of Appellate Procedure.[1]

A subsidiary question is whether state-court appellants are entitled to effective assistance of *appellate* counsel, as they are to *trial* counsel, after the trial ends following felony conviction, and jurisdiction leaves the trial court and attaches in the appellate court. That is,

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[1]It appears, *infra* at p. 20, that the United States Court of Appeals for the Sixth Circuit, by indirection, is asking this Court to review its opinion.

trial is Constitutionally fundamental, but is state-court appeal also Constitutionally fundamental?

These questions are critically important to the Constitutional functioning of Kentucky's appellate courts and appellate procedures, and to the Constitutional administration of justice in Kentucky, as well as to all state courts. Numerous cases of this nature presently are being litigated in the Kentucky courts and in federal habeas corpus courts on review. Without exception, the federal courts have determined that Constitutional error occurred when Kentucky's appellate courts dismissed appeals from criminal convictions, based upon failure to follow procedural rules. This is so even though, by tradition and law, such dismissal of appeals in Kentucky heretofore has been accepted as appropriate, proper and lawful. Certainly, the above-cited federal rules of dismissal clearly announce that dismissal of appeals by United States courts does not offend the Constitution. Otherwise, this Court could not countenance their existence.

Under the authority of *McKane* v. *Durston,* 153 U. S. 684, at 687-688 (1894), state-court appeal is not a due process requirement of the Constitution:

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.
>
> * * *
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon

> such terms as in its wisdom may be deemed proper. * * * [W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

Thus, Kentucky need have no appeal procedure whatsoever, as a matter of federal Constitutional law, the matter of appeal apparently having been reserved by the states unto themselves, Tenth Amendment, United States Constitution.

Through §§ 115-116 of its Constitution, Kentucky has created a system of limited and conditional appeal. That is, appeal may be taken only by following certain authorized rules of procedure. If those rules are not followed by all who would appeal, the appeal may be dismissed. The promulgation and enforcement of such procedural rules prevents chaos on appeal, enhances orderly and effective proceedings, and in fact provides all citizens with the equal protection of law. *Williams* v. *Payne,* Ky., 515 S. W. 2d 618, 619 (1974).

That appeal in Kentucky is not absolute is confirmed by (Ky.) CR 76.34(6), which provides that appeals may be dismissed in their entirety; by *Cleaver* v. *Commonwealth,* Ky., 569 S. W. 2d 166 (1978), which approved dismissal of a direct appeal from a murder conviction; as well as by the twice dismissal by the Supreme Court of Kentucky of respondent's state appeal.

It is clear then, that Kentucky has created a conditional and limited system of appeal as approved by *McKane, supra.*

However, both the Sixth Circuit and the District Court erroneously concluded that in Kentucky appeal is absolute. Based upon that erroneous analysis of Kentucky law, both courts then proceeded to erect thereon an error of federal Constitutional law.

In so doing they did not address the reality, that if dismissal of appeals by federal courts based upon appellate counsel's procedural default is Constitutional, then so also must it be for state courts. It would be odd indeed for federal courts to impose Constitutional limitations upon state courts which they do not impose upon themselves. *Ross* v. *Moffitt,* 417 U. S. 600, at 617-618 (1974).

These federal rules buttress petitioner's argument. The violation of these rules which leads to their operation may be occasioned by the acts or omissions of appellate counsel. If violation of these rules automatically points to ineffective assistance by appellate counsel, or deprivation of appellate counsel, on Constitutional grounds, this Court could not countenance their existence and their enforcement would be worse than useless.

These federal rules are a practical application in federal jurisdiction of the logic expressed in *McKane, supra,* and in *Moffitt, supra* and *infra,* that there is no Constitutional due process right to a state criminal appeal or any of its parts. Since criminal appeals in federal law were unknown prior to 1889, *Carroll* v. *United States,* 354 U. S. 394, 400-401, n. 9 (1957), it is seen that no substantive or fundamental due process right to appeal arises from the Constitution. Logically

and historically, therefore, there can be no Sixth Amendment right to effective assistance of *appellate* counsel. The Constitutional right to effective assistance of *trial* counsel is derived from the Sixth Amendment, *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir., 1974), which is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). The Sixth Amendment applies only to *trial* counsel and does not apply to *appellate* counsel.

Appeals and appellate counsel were unknown to federal law when the Sixth Amendment was adopted, and they remained unknown for another one hundred years, *Carroll, supra.* Appeal, it therefore is seen, is not a fundamental and independent Constitutional right to protect life, liberty or property. Such protection occurs at trial, and the failure of appellate counsel to timely file a brief on appeal does not offend the Sixth Amendment. Whatever happens in appellate court is not governed by due process standards which apply at trial. Those fundamental trial standards simply cease to exist when appeal commences, *McKane, supra,* and *Moffitt, supra* and *infra.*

Thus, the *McKane* law that appeals may be limited and conditioned upon procedural rules prevails in United States law in just the same manner as it prevails in Kentucky law. That is, counsel's acts or omissions on appeal simply do not offend the Constitution as a matter of due process, *Moffitt, supra* and *infra,* and respondent is without any federal remedy as regards his state-court appellate default. Of course, any

allegation of violation of a Constitutional right at state *trial* could be vindicated by resort to habeas corpus in federal court. Interestingly, respondent in all the time he has spent in federal courts has *never* alleged in federal court that his state *trial* resulted in denial of a Constitutional right.

That being the case, petitioner submits that there can be no Constitutional right to effective assistance of *appellate* counsel on appeal, at least as such assistance applies to trial counsel in the fundamental arena of the trial court. After all, what default by appellate counsel can be worse than that default which leads to dismissal of the entire appeal? *McKane, supra.*

The reason there is no Constitutional right to state appeal, or to prohibition of dismissal of appeal, or to effective assistance of appellate counsel, is articulated in *Moffitt, supra,* at 610-611, as follows.

Trial is fundamental. Appeal is not fundamental. A state trial court may not dispense with trial without the consent of the criminal defendant. A state appellate court, however, may dispense with appeal without the appellant's consent. Appeal, therefore, is no part of trial. Trial and appeal are significantly different and accomplish different things.

Accordingly, at some point the trial must end and the appeal, if any, begin. So do the duties of trial counsel end and the different aspects of appellate counsel representation begin. Kentucky law marking this point of change, *Hoy* v. *Newburg Homes, Inc.,* Ky., 325 S. W. 2d 301, 302 (1959) is binding upon federal courts, because any grant or privilege of state appeal

is not a matter of fundamental due process under the Constitution.

The creation of appeal for criminal defendants, as well as the conditions of its taking, is entirely dependent upon the wisdom of state law, *McKane, supra.* That is, whether any appeal exists in any form at all in Kentucky is entirely a Kentucky consideration and states may attach such conditions and limitations to appeal as they alone see fit, without offending due process. *McKane, supra.* Since the assistance of appellate counsel is ancillary to the non-fundamental grant of state appeal, assistance of appellate counsel can rise to no greater due process status that the appeal itself.

Sections 115-116 of the Kentucky Constitution and the rules promulgated thereunder are entirely consistent with due process requirements. Respondent under the United States Constitution not being entitled to an appeal at all in Kentucky, except for the Kentucky Constitutional procedure granting one under conditions and limits, thus has no federal entitlement beyond what §§ 115-116 provide.

Therefore, dismissal of a state-court appeal does not offend the Constitution on due process grounds. Conceptually, for a person in respondent's present position, the right of appeal simply does not exist as a matter of state law. Thus a right of state appeal does not exist as a matter of Constitutional law.

And equal protection considerations, which must be made on a case-by-case factual basis, cannot elevate an appellate to an exalted position so that he may dis-

regard state procedural requirements which all who would appeal must follow, as will be seen, *infra.*

Moffitt, supra, is important in another regard. It represents the first apparent attempt by this Court to come to grips with a generation of imprecise and ambiguous opinions which it has written in the area of state-court appeal. Those opinions begin with *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and *Douglas* v. *California,* 372 U. S. 353 (1963).

This *Griffin-Douglas* line of opinions, without ever identifying and explaining the Constitutional source of the asserted appeal right, tends to raise for the first time the idea that there may be a Fourteenth Amendment due process right under the Constitution to effective assistance of counsel on state-court appeal, and that it somehow may be buttressed by equal protection.

Moffitt, at 608-609, takes particular notice of this imprecise analysis and unidentified source of the asserted Constitutional right to state-court appeal, as expressed in this Court's *Griffin-Douglas* line of opinions:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. *Neither Clause by itself provides an entirely satisfactory basis for the result reached,* each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual

> dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. (Emphasis added).

Petitioner submits that the *Griffin-Douglas* line of cases does not stand for the proposition that there is a due process right to effective assistance of appellate counsel, as opposed to trial counsel, on state-court appeal. To do so would be to overrule *McKane, supra,* and its continuing vitality is explicitly confirmed by *Moffitt, supra,* at p. 606.

Moffitt is the most direct examination made by this Court in the area of due process rights, if any, on state-court appeal, and clearly questions the Constitutional basis and reach of this Court's *Griffin-Douglas* line of statements on the matter. *Moffitt,* then, is seen as the first step taken by this Court to limiting the *Griffin-Douglas* sway, and adhering to the clear teaching of *McKane,* as regards state appeals procedures.

The Sixth Circuit, in upholding the *result* of the District Court in its *Cleaver* opinion, upon which its decision herein was based, did so by a different method. The Sixth Circuit declared that dismissal of a state-court appeal was an equal protection violation, and alternatively a due process violation. Yet the Sixth Circuit in the present case of Brown set out no facts whatsoever to show an equal protection violation (A 27). Therefore, the Sixth Circuit opinion cannot stand unless there is a due process right to state-court appeal, as the District Court found.

Facts which were before the Sixth Circuit in the present case indicate that, if appellate counsel was overworked, as that court found to be the case in *Cleaver,* it was because of the exercise of appellate counsel's own independent judgment. The appeals brief he late-tendered and which led to the first dismissal of the appeal was 85 pages in length. The brief he tendered in his belated attempt at appeal was only 46 pages in length. In reducing the size of his brief by almost one-half, there was no allegation by appellate counsel or by respondent of prejudice through smaller size. Thus, it appears that doing almost double the amount of research and work for the first defaulting brief was unnecessary. This assumes, too, that the 46-page brief itself was not overly long. The responsive brief for the Commonwealth of Kentucky, on shorter paper, was only 34 pages in length, including its own facts and including authority on a point which respondent's appellate counsel said he could not find and which he invited the Commonwealth to find and present to the Supreme Court of Kentucky (JA 113-114).

Furthermore, the direct claim of deprivation made by respondent in his habeas corpus petition was not that he had been deprived of appellate counsel, as the Sixth Circuit found in its *Cleaver* decision, but that appellate counsel's assistance instead was ineffective. His only direct equal protection claim within that petition was that the Supreme Court of Kentucky dismissed his appeal, which he thought was absolutely guaranteed by *Kentucky* law. His secondary claims

of overwork were made in a memorandum accompanying his petition.

Further, the record does not show without dispute in this case that respondent was denied counsel to process his appeal while other persons in Kentucky who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by Kentucky's highest court. Petitioner specifically denied this by asserting that respondent was in no way singled out for loss of his appeal, and that all appellants in Kentucky must follow these rules or lose their appeal (JA 85).

The case of *Lucey* v. *Seabold,* No. 79-3752, was argued before the Sixth Circuit at the same time the present case and *Cleaver* were argued. The appellate counsel who defaulted in *Lucey,* leading to dismissal of the Kentucky appeal, was *retained.* As of this writing, no decision has been rendered by the Sixth Circuit in *Lucey.* Nor was the District Court impressed with the secondary claims of appellate counsel's workload. Far from finding appellate counsel overworked, the District Court thought it just as likely that respondent's appellate counsel simply made "a tacit decision to ignore a plain directive of the Kentucky Supreme Court" (A 42). The District Court also invited respondent's appellate counsel, who had continued to represent respondent in federal court, to reconsider that continued representation on grounds of incongruity and conflict of interest (A 42). Petitioner also sought an evidentiary hearing on claims of ineffectiveness in the District Court (JA 92), and at oral argu-

ment in the Sixth Circuit noted that this could include an examination into claims of workload.

The Sixth Circuit concluded its opinion in *Cleaver* v. *Bordenkircher,* No. 79-3514, upon which decision in the present case was legally based, with this remarkable assertion of its own Constitutional uncertainty about what it had just done:

> In the District Court in our present case, the District Judge relied primarily upon a *due process* analysis based upon denial of counsel. In the event the largely *equal protection* rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *. (Emphasis added) (A 33).

Inasmuch as the District Court decision in the present case also was based upon due process, the same uncertainty must exist here.

It is clear that the Sixth Circuit was uncertain about whether to justify its opinion upon due process or upon equal protection grounds. It also is clear that nowhere did that court identify and explain the source of the purported Constitutional right it proclaimed. It appears, in fact, that the Sixth Circuit may be asking this Court to resolve the matter. This is because only this Court has the power to find that an equal protection rationale is inadequate to sustain the writ of habeas corpus. Thus, it is to this Court that the Sixth Circuit's fear of reversal of its equal protection opinion had to be addressed.

The only assertable Constitutional requirement regarding appeal, based upon equal protection considerations, is that the state treat everyone substantially the same as regards appeals.

Here, respondent nowhere alleged that he was singled out to arbitrarily cut off his appeal or that Kentucky's rules are other than neutral on their face. There has been no showing that Kentucky left the appeal door open for more affluent persons who did not follow its rules, nor do the facts of record so indicate. And, of course, in the present case, the Sixth Circuit set forth no facts showing an equal protection implication.

Equal protection prohibits discrimination which is either invidious or without a rational basis, or discrimination that is based upon race, creed, color or similar suspect classification. Equal protection means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Mallett* v. *North Carolina,* 181 U. S. 589, 598 (1901).

The Constitutional right to appellate counsel, to the extent it may exist, arises from the Equal Protection Clause of the Fourteenth Amendment, *Anders* v. *California,* 386 U. S. 738 (1967). The protection afforded to an appellant is strictly limited by the ambit of the equal protection clause, *Moffitt, supra.* Accordingly, unless the procedural default in failing to timely file the brief on appeal was occasioned by invidious discrimination against an appellant, the limited equal

protection right of *Anders, supra,* is not violated. Further, unless the procedural default was occasioned by the creation by the state of an unfair advantage for itself, no right of *Moffitt, supra,* is violated.

There is no showing that the procedural default on direct state appeal was occasioned here by unfair advantage. Kentucky's system of appeal is rational and is neutral on its face and in its application. All persons are treated fairly and equally under Kentucky's system of appeal which, in the first place, is not itself a requirement of the Constitution. Any appeal would have been dismissed under the procedural default which occurred here.

In this regard, petitioner reiterates that this Court in *Moffitt, supra,* has taken the first step in dealing with the Constitutional haziness which may have led to the Sixth Circuit opinion, and which also tries to implicate fundamental due process standards for the first time.

An exaggeration may be useful to highlight the character of the Sixth Circuit opinion. What that court did was to base its decision upon the brightness of high noon, but if that turns out to be an insufficient basis, then to justify it upon the darkness of deepest midnight.

Such uncertain justification is no basis for declaring Constitutional imperatives which have profound effect upon state-court appeal procedures, especially where this Court has declared without reservation that states need have no appeals procedures whatsoever, or that if they do, they may tailor and condition them as they alone see fit.

The Sixth Circuit has violated this Court's authority in *McKane, supra,* and *Moffitt, supra,* as well as that which is embodied in Rules 16.1 and 33.7 of this Court and 31(c) of the Circuit Courts. Further, it has violated the principles of comity and federalism which this Court has so strongly announced in such opinions as *Francis* v. *Henderson,* 425 U. S. 536 (1976), and its respect for state procedures, as in *Wainwright* v. *Sykes,* 433 U. S. 72 (1977). This strong policy of federalism and respect applies even when proceedings in the fundamental *trial* arena are at issue.

In turning from the teachings of this Court, the Sixth Circuit has created untenable and unconstitutional problems for the appeals process in Kentucky and in the other states.

The question presented here is of plenary national importance, because it implicates state appellate procedures in the entire United States. That is, if Kentucky courts cannot dismiss appeals under state Constitutional authority, based upon acts or omissions of appellate counsel, then neither can the courts of any other state.[2]

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[2]The Fourteenth Amendment protects liberty and property interests without apparent distinction. To say that a state court cannot dismiss a *criminal* appeal because of appellate counsel's procedural default is to say that state courts similarly cannot dismiss *civil* appeals based upon appellate counsel's procedural default. The leisure time used by John Locke, and later the Founding Fathers, to think their great thoughts of liberty which underlie our republic would have been impossible without property rights and the accumulation of means sufficient to support their leisure and their great thoughts. Liberty and property interests, to this extent as least, are intertwined.

While this inability to dismiss appeals exists in the courts of Kentucky and of the other states, everyone involved will know absolutely that federal courts still allow themselves to dismiss appeals without offense to the Constitution. Everyone will understand the Orwellian observation, that while all court rules and procedures are equal, some court rules and procedures are more equal than others.

CONCLUSION

Petitioner submits that this is a question of plenary national importance which should be accepted for resolution under the authority of this Court's Rules 17.1(a) and (c).

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Counsel of Record
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4044
Counsel for Petitioner

PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, with first class postage prepaid, to Mr. Jack Emory Farley, Mr. Kevin Michael McNally, Ms. M. Gail Robinson, Office of Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, counsel for respondent, and that all parties required to be served have been served, all on this January 26, 1981.

J. Gerald Henry

Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3589

JAMES H. BROWN III, - - - *Petitioner-Appellee,*

v.

STEVE SMITH, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, LAGRANGE, KENTUCKY (In lieu of Richard L. Hinton, Judge, Mason Circuit Court, Maysville, Kentucky), - - - - - *Respondent-Appellant.*

ORDER (Entered October 31, 1980)

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

On receipt and consideration of an appeal in the above-styled case; and

On consideration thereof finding that the issue presented is identical with that decided this date in *Cleaver* v. *Bordenkircher*, ____ F 2d ____ (6th Cir. 1980) (No. 79-3514, decided October 31, 1980).

Now, therefore, the judgment of the District Court is affirmed for the reasons set forth in the *Cleaver* opinion.

Entered by order of the court

(s) John P. Hehman,
Clerk

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No. 79-3514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE H. CLEAVER,
Petitioner-Appellee,

v.

DONALD E. BORDENKIRCHER,
Superintendent, Kentucky State Penitentiary,
Respondent-Appellant.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed October 31, 1980
(Entered October 31, 1980)

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

EDWARDS, Chief Judge. Respondent warden appeals from an order of the United States District Court for the Eastern District of Kentucky granting appellee Cleaver's petition for a writ of habeas corpus.

The facts show that Cleaver had been convicted in a Kentucky State Court on an indictment charging murder and robbery in the first degree. He was sentenced to life imprisonment. His counsel at trial was a court-appointed public defender who filed the appropriate notice of appeal in timely fashion.

After repeated extensions to allow for the filing of the record on appeal, the public defender was faced with a 40-day limitation on the filing of his appellate brief. Detailing

the work in other cases assigned to him which he had to accomplish during the time span involved, Cleaver's counsel sought a 30-day extension which the Supreme Court granted "as a final extension." At the end of that 30 days, and on the date when the appellate brief was required to be filed, the same counsel filed a motion requesting an additional 30-day extension, giving as reasons the following:

> During the next ten (10) days, the undersigned counsel has seven (7) appellate briefs which are scheduled to be filed with this Court and the Court of Appeals. In an attempt to complete as many of these pleadings as possible, the undersigned counsel has been forced to devote a majority of his available time to completing other cases to the detriment of appellant's appeal. The requested additional time is required to allow the undersigned counsel to devote the time to appellant's case which is necessarily required by its complexity and length.

The public defender's motion continued:

> Under *Anders* v. *California*, 386 U. S. 738, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1975), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from

> the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

The Kentucky Court of Appeals denied this motion for an additional extension. It also dismissed the appeal. When counsel went back to the trial court and sought and received an order reinstating the appeal, the Supreme Court held a hearing and decided that the trial court had no authority to readjudicate a procedural issue already decided by the highest court of the state. It again dismissed the appeal.

While there is no doubt as to the validity of this last ruling, the net result of the entire procedure is that the record shows, without dispute, that appellee Cleaver was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by the highest court in the state.

The District Judge who issued this writ did so on the basis of his view that appellant had been denied the effective assistance of counsel, relying in part upon *Douglas* v. *California,* 372 U. S. 353 (1963), and *Anders* v. *California,* 386 U. S. 739 (1967), and distinguishing *Ross* v. *Moffitt,* 417 U. S. 600 (1974).

Petitioner Cleaver, of course, has no federal constitutional right to appeal his state court conviction. *McKane* v. *Durston,* 153 U. S. 684 (1894). He has, however, a state constitutional right of appeal (Kentucky Constitution

§ 110(2)(b)[1]). This right cannot be regarded as having been vindicated by the appointment of a public defender who is so overloaded with work as to be unable to service his appeal as of right. Deprivation of counsel on this ground cannot, of course, be established merely by the public defender's assertion. Here, however, the facts alleged by the public defender concerning overload have not been disputed either in the proceedings before the State's highest court or in the briefing and argument in this federal habeas proceeding.

We recognize that the Attorney General does claim that "there is no proof that the state withheld adequate funds or staff to process indigent appeals." The record in this case is, however, proof to the contrary of this assertion and the same may be said of the record currently before us in *Brown* v. *Smith*, ____ F. 2d ____ (6th Cir. 1980) (No. 79-3589), wherein a similar habeas writ has been granted on similar facts by another United States District Judge.

The Attorney General also asserts, "The proper procedure would have been to request the assignment of additional personnel to handle the increased caseload." We do not, however, think that proving where the budget-making processes or personnel assignment procedures of the Commonwealth of Kentucky broke down is an appropriate burden to place upon an indigent habeas petitioner or his counsel. The state-appointed counsel for this defendant has stated that he could not perform his responsibility to perfect appellant's appeal because of an excessive workload. This assertion, if untrue, could have been contested,

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[1] "Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules." Kentucky Constitution § 110(2)(b).

but was not. It stands undenied on this record. An affluent defendant who sought to retain an overburdened lawyer could and would have hired another. This petitioner was denied equal protection of the law by being denied the right to appeal which Kentucky granted to others by its Constitution.

On this record we must conclude (and do) that the reason the public defender was delinquent in observing the time limitations facing him in processing this appeal was an overload of other appellate work before the Supreme Court of Kentucky, and that this overload rendered observance of the time limitation in this case impossible.

We recognize Kentucky's right to decide, in the first instance, any disputed issue of fact concerning representations of work overload by counsel supplied by the State. If inaccurate claims are tendered, Kentucky can take measures to discipline any lawyer found to be untruthful in such representations, or willfully or negligently delinquent. We believe, however, that the facts upon which we rely in this case are undisputed. As a result of them petitioner has been deprived of the right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation. In *Ross* v. *Moffitt,* 417 U. S. 600 (1974), the Supreme Court said:

> The cases encompassed a variety of circumstances but all had a common theme. * * *
>
> [They] stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. *Ross* v. *Moffitt, supra* at 606-07.

In *Ross* v. *Moffitt, supra,* the opinion of the Court also observed that the entitlement to appellate counsel (where the state grants an absolute right to appeal) implicates

both the equal protection clause and the due process clause. *Id.* at 608-09.[2]

In the District Court in our present case, the District Judge relied primarily upon a due process analysis based on denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge and dated May 29, 1979.

The judgment of the District Court is affirmed.

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[2]The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Proces Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and th individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding section. Ross 1 *Moffitt*, supra at 608-09. (footnote omitted).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN, III - - - - - *Petitioner,*

v.

RICHARD L. HINTON - - - - - *Respondent.*

ORDER (Entered June 27, 1979)

The Court having read the record in this case, including the Magistrate's Report and recommendation filed September 25, 1978, and the objections of the respondent thereto, it is hereby

ORDERED AS FOLLOWS:

1. The Magistrate's Memorandum Opinion of September 5, 1978, and Report and Recommendation filed September 25, 1978, be and are adopted in full by this Court. This Court was of the opinion to adopt the Magistrate's Report and Recommendation before it read the learned and well-reasoned decision of its distinguished colleague, Judge H. David Hermansdorfer, in *Cleaver* v. *Bordenkircher,* Pikeville Civil No. 78-204, E.D. Ky., May 30, 1979, and that decision only reinforces that belief that a writ should issue.

2. The application for writ of habeas corpus be and is granted and a writ be and is issued, but it is stayed for a period of sixty (60) days from the date of this Order so that the petitioner's appeal to the Kentucky Supreme

Court may be reinstated, or if the appeal is not reinstated, the conviction is set aside and petitioner is granted a new trial.

3. The petitioner's motion to enlarge him on bond pending determination of the issues presented in his application for a writ of habeas corpus is rendered moot by this Judgment and is hereby overruled.

4. The motions by the respondent to hold the matter in abeyance pending the examination of pleadings from *Cleaver* v. *Bordenkircher* be and are overruled as moot.

This 25 day of June, 1979.

(s) Eugene E. Siler, Jr., Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN, III - - - - - - *Petitioner,*

v.

RICHARD L. HINTON - - - - - - *Respondent.*

JUDGMENT (Entered June 27, 1979)

In accordance with the Order of even date, it is hereby ORDERED AND ADJUDGED AS FOLLOWS:

1. Petitioner be and is granted judgment against the respondent.

2. The petition for a writ of habeas corpus be and is granted, but this ORDER be and is stayed for a period of sixty (60) days from the date of this Judgment.

3. If, at the end of sixty (60) days, no reinstatement of petitioner's appeal has been effected, the writ shall issue upon motion by the petitioner.

This 25 day of June, 1979.

(s) Eugene E. Siler, Jr., Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN, III, - - - - - *Petitioner,*

v.

RICHARD L. HINTON, JUDGE
Mason Circuit Court
Maysville, Kentucky - - - - *Respondent.*

MEMORANDUM OPINION AND ORDER—

Filed September 5, 1978
(Entered September 7, 1978)

James H. Brown III was convicted of the offense of murder by a jury of the Mason Circuit Court. Final judgment was entered on October 15, 1976, and the next day petitioner filed his notice of appeal as required by R Cr 12.52 and 12.54, Kentucky Rules of Criminal Procedure. Petitioner then timely filed the record on appeal, R Cr 12.56 and 12.58, but requested an extension of time in which to file his appellate brief. He was granted the requested extension and was so notified by letter dated March 30, 1977. The body of that letter reads as follows:

> "Appellant's motion for an extension of time to and including April 15, 1977 in which to file his brief has been GRANTED by this Court AS A FINAL EXTENSION TO AND INCLUDING APRIL 15, 1977 FOR FILING."

On April 15, 1977, petitioner's court appointed counsel sought another extension, but this time the request was denied on May 18, 1977. Repeated efforts by petitioner's counsel to obtain leave to file his belated brief proved fruitless. Petitioner's appeal was dismissed and his conviction affirmed by the Kentucky Supreme Court on October 5, 1977.

On October 31, 1977, petitioner brought this action seeking habeas corpus relief under 28 U.S.C. §2254, alleging that he was denied his right of appeal under Section 115 of the Kentucky Constitution and his right to effective assistance of counsel on appeal. Pursuant to Local Rule 4, and Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, 20 U.S.C. fol. §2254, the undersigned conducted a preliminary review of the petition. Thereafter, upon a determination that petitioner had failed to exhaust state remedies available to him under R Cr 11.42, I recommended, on November 7, 1977, that the relief sought by petitioner be denied until he exhausted his available state post-conviction remedies. Record No. 4. After considering, but rejecting, petitioner's particularized objections to my Report and Recommendation, Record No. 7, this Court per Judge Siler adopted the same as the basis for its finding that petitioner had failed to exhaust his state remedies. Record No. 8. The matter was retained on this Court's docket pending petitioner's efforts to obtain state court relief. *Id.*

Petitioner endeavored to obtain relief through R Cr 11.42 proceedings instituted in the trial court. On March 17, 1978, apparently relying on *Blankenship* v. *Commonwealth,* Ky. App., 554 S. W. 2d 898 (1977), the trial judge (who incidentally is the named respondent herein) granted petitioner a "belated appeal" from the previously entered judgment of conviction. However, on August 22, 1978, the Kentucky Supreme Court *sua sponte* dismissed petitioner's

appeal for the reasons set out in *Cleaver* v. *Commonwealth*, Ky., ____ S.W. 2d ____ (Decided July 3, 1978).

There is no question, at least in my mind, that petitioner has now exhausted his state post-conviction remedies. I base this conclusion not only on petitioner's good faith attempt to secure a belated appeal through R Cr 11.42 proceedings, but also upon the tacit admission by the Kentucky Supreme Court that, as in *Cleaver, supra,* petitioner's claim that he was denied the effective assistance of counsel was considered prior to the dismissal of his first appeal. Thus, it is now time to address the merits of the petitioner's averments.

As noted above, the critical question is whether, due to the ineffectiveness of appointed counsel, petitioner has been denied his right to an appeal under Section 115 of the Kentucky Constitution. To begin, the United States Court of Appeals for the Sixth Circuit has held that, when appellate counsel through inadvertence, oversight, neglect or press of other business fails to timely protect and perfect his client's right of appeal, then such counsel has not acted in a manner expected of a competent criminal lawyer. *Boyd* v. *Cowan*, 519 F. 2d 182 (6th Cir. 1975) *(Boyd II); Boyd* v. *Cowan*, 494 F. 2d 338 (6th Cir. 1974) *(Boyd I); Woodall* v. *Neil*, 444 F. 2d 92 (6th Cir. 1971); *Goodwin* v. *Cardwell*, 432 F. 2d 521 (6th Cir. 1970); *Newman* v. *Black*, Covington Civil Action No. 76-78 (E.D. Ky. Decided April 13, 1977). Moveover, even though the Federal Constitution contains no express requirement for appellate review of criminal convictions, *see e.g., Ross* v. *Moffitt*, 417 U. S. 600, 611 (1974); *Ortwein* v. *Schwab*, 410 U. S. 656, 660 (1973), if such review is provided, that review cannot be forfeited by a critical error of appointed counsel without abridging the Due Process Clause of the Fourteenth Amendment. *Boyd II, supra; Newman, supra.*

Accordingly,

IT IS ORDERED herein as follows:

(1) That a copy of this Memorandum Opinion and Order be served by certified mail upon petitioner's counsel, respondent and respondent's counsel — the Attorney General of Kentucky.

(2) That respondent within ten days of the date of such service shall show cause why I should not recommend that a writ of habeas corpus issue unless petitioner be granted within a reasonable time, review of his trial as if on an original appeal, *see Boyd II, supra* at 184; *Tipton* v. *Commonwealth,* Ky., 456 S. W. 2d 681 (1970), or a new trial.

This the 5th day of September, 1978.

(s) Joseph M. Hood
United States Magistrate

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Civil Action No. 77-141

JAMES H. BROWN III - - - - - *Petitioner*

v.

RICHARD L. HINTON, Judge - - - *Respondent*

MAGISTRATE'S REPORT AND RECOMMENDATION—
Filed September 25, 1978
(Entered September 27, 1978)

Section 115 of the Kentucky Constitution provides every convicted defendant with a right of appellate review of his conviction. Given this right, the Fourteenth Amendment to the United States Constitution requires that an indigent be provided, *inter alia,* with counsel to assist him in perfecting that appeal. *Griffin* v. *Illinois,* 351 U. S. 12 (1956). Furthermore, it follows, *a fortiori,* that such counsel must provide his client with effective assistance on appeal. *Boyd* v. *Cowan,* 519 F. 2d 182 (6th Cir. 1975) (Boyd II); *Boyd* v. *Cowan,* 494 F. 2d 338 (6th Cir. 1974) (Boyd I); *Woodall* v. *Neil,* 444 F. 2d 92 (6th Cir. 1971); *Goodwin* v. *Cardwell,* 432 F. 2d 521 (6th Cir. 1970); *Newman* v. *Black,* Covington Civil Action No. 76-78 (E.D. Ky. Decided April 13, 1977) (Siler, J.).

From the facts previously presented to the Court, Record No. 4, it is clear that petitioner's appellate counsel,[1] Jack Emory Farley, Esq. and Kevin Michael McNally, Esq. failed to heed an unambiguous directive of the Kentucky Supreme Court requiring them to file petitioner's appellate brief no later than April 15, 1977. As a result of that failure, petitioner's appeal was dismissed and his murder conviction was affirmed.[2]

As directed, Record Nos. 7 and 8, petitioner has now presented his claim that his attorneys' failure to perfect his right of appeal constituted a denial of effective assistance of counsel on appeal to the Kentucky courts. Those

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[1]At trial petitioner was represented by Robert Gallenstein, Esq. Mr. Gallenstein, however, did not represent petitioner on appeal for some reason not explained in the record. In any event, none of the acts of omission charged herein are attributed to Mr. Gallenstein.

Petitioner is represented here by the same attorneys who by their own admission, failed to perfect his appeal. I must concede that these attorneys have been tenacious in their attempts to correct their error whether that error be the product of overwork, as was alleged in their motions for extensions of time below, or a tacit decision to ignore a plain directive of the Kentucky Supreme Court. In either case, it seems incongruous and perhaps a conflict of interest that they are now engaged in a matter where they could conceivably be called as witnesses. Counsel should explore their position in light of these unsolicited comments above.

[2]Respondent advances the attractive and acknowledged argument that state procedural rules should be given great deference. *See Wainwright* v. *Sykes* 433 U. S. 72 (1977); *Brown* v. *Commonwealth*, Ky., 551 S. W. 2d 557 (1977). Should a failure by counsel to adhere to those rules necessarily result in the denial of appellate review of a conviction? That is the dilemma which must be resolved. It is suggested that sanctions could be imposed on counsel in lieu of penalizing the client for the actions of appointed counsel. *See Blankenship* v. *Commonwealth*, Ky., 554 S. W. 2d 898, 902 (1977).

efforts were to no avail as the Kentucky Supreme Court, *sua sponte,* dismissed his belated appeal for the reasons set out in *Cleaver* v. *Commonwealth,* Ky., ____ S. W. 2d ____ (Decided July 3, 1978). Although fruitless, it must be said that petitioner's efforts in the state courts exhausted those state court remedies available to him. *Cf. Smith* v. *Digmon,* ____ U. S. ____, 22 Cr L 4150 (January 18, 1978).

Accordingly, it is recommended that a conditional writ of habeas corpus issue. Petitioner should be released from all custody attributable to the proceedings in the Mason Circuit Court unless respondent vacates the judgment of conviction entered on October 15, 1976 and reinstates that judgment by resentencing petitioner, the procedure approved by the Kentucky Court of Appeals (now Supreme Court) in *Hammershoy* v. *Commonwealth,* Ky., 398 S. W. 2d 883 (1966). *See also Stinett* v. *Commonwealth,* Ky., 446 S. W. 2d 292 (1969); *Tipton* v. *Commonwealth,* Ky., 456 S. W. 2d 681 (1970); *Prater* v. *Commonwealth,* Ky., 476 S. W. 2d 833 (1972); *Blankenship* v. *Commonwealth,* Ky. App., 554 S. W. 2d 898 (1977); *Self* v. *United States,* 574 F. 2d 363, 366 (6th Cir. 1978). If the Commonwealth is incapable of providing petitioner with a direct appeal from his conviction upon resentencing that conviction should be set aside and petitioner granted a new trial.

The parties shall file their particularized objections to this Report and Recommendation within ten days of the date of service of the same. 28 U.S.C. §636(b)(1).

This the 25th day of September, 1978.

(s) Joseph M. Hood
United States Magistrate

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3589

JAMES H. BROWN, III - - - *Petitioner-Appellee*

v.

STEVE SMITH, Superintendent of Kentucky State Reformatory at LaGrange, Kentucky - - - - - - *Respondent-Appellant*

ORDER STAYING MANDATE—Entered December 2, 1980

BEFORE: EDWARDS, Chief Circuit Judge, ENGEL and JONES, Circuit Judges.

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certioari is hereby granted and the mandate is stayed for seventy-five days from this date; provided that, if within such seventy-five days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied within such seventy-five days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

THE CONSTITUTION OF THE UNITED STATES

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

* * * * * * *

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * * * * *

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing in-

surrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * * * * *

SUPREME COURT OF THE UNITED STATES

RULE 16.1

1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause repends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

* * * * * * *

RULE 33.7

7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

* * * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE
RULE 31(c)

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

* * * * * * *

No. 80-1277

APR 29 1981

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - - - Petitioner

versus

JAMES H. BROWN III - - - - - Respondent

SUPPLEMENTAL BRIEF FOR PETITIONER, WITH APPENDIX, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEVEN L. BESHEAR
Attorney General

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SUPREME COURT OF THE UNITED STATES

No. 80-1277

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - *Petitioner*

v.

JAMES H. BROWN III - - - *Respondent*

SUPPLEMENTAL BRIEF FOR PETITIONER, WITH APPENDIX, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner's supplemental brief to the pending petition for writ of certiorari herein is presented under authority of Rule 22.6 of this court. It calls to this court's attention two after-decided cases of the United States Court of Appeals for the Sixth Circuit, *Lucey* v. *Seabold,* No. 79-3752, and *Gilbert* v. *Sowders,* No. 79-3597, both decided April 2, 1981. Appendix, pp. 7-8, 9-17.

Both of these after-decided cases substantially undermine and seriously question the Sixth Circuit's opinion in *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (1980). *Cleaver* forms the basis of decision in the within case of *Smith* v. *Brown,* in which a writ of certiorari is being sought. See that petition at p. 8, 27.

Cleaver's primary rationale, by its own statement, is equal protection. It claims in the following language

that Kenutcky courts dismiss appeals of unmonied appellants while at the same time hearing and adjudicating claims of monied appellants:

> The Kentucky Court of Appeals denied this motion for an additional extension. It also dismissed the appeal. When counsel went back to the trial court and sought and received an order reinstating the appeal, the Supreme Court held a hearing and decided that the trial court had no authority to readjudicate a procedural issue already decided by the highest court of the state. It again dismissed the appeal.
>
> While there is no doubt as to the validity of this last ruling, *the net result of the entire procedure is that the record shows, without dispute, that appellee Cleaver was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by the highest court in the state.* (Emphasis added).

In *Lucey* and *Gilbert,* however, the Sixth Circuit absolutely contradicts its own assertion in *Cleaver. Lucey* and *Gilbert,* at Appendix, pp. 7, 9, state matter-of-factly that both counsel therein whose procedural default led to dismissal of the appeals were *retained.* Both cases, then, conclusively show that the Sixth Circuit in *Cleaver* erred in saying that Kentucky courts condone a double standard of dismissing or not dismissing appeals, based solely upon financial means.

Accordingly, *Cleaver's* equal protection rationale has been confounded by its own authors. The *Brown*

and *Cleaver* cases were decided by the same three judges of the Sixth Circuit who decided *Lucey* and *Gilbert*. All these cases were argued before those same judges on the same day, April 4, 1980. *Brown* and *Cleaver* were decided October 31, 1980. *Lucey* and *Gilbert* were decided more than five months later by the same judges, or almost exactly one year after oral argument in all those cases.

Lucey and *Gilbert* show that Kentucky appellate courts, without distinction, dismiss appeals of appellants who have either appointed or retained counsel. Violation of Kentucky's neutral procedural rules, upon which Kentucky's limited appeal procedure is conditioned, is the only test for dismissal. Who violates the appellate rules is of no matter. Thus, *Lucey* and *Gilbert* show that the *Cleaver* equal protection rationale is based upon an absolutely erroneous statement of Kentucky appellate court custom and practice.

CONCLUSION

Petitioner submits that the described after-decided cases of the Sixth Circuit abundantly show the error of the court's *Cleaver* opinion, and submits that these cases are additional strong evidence that this court should grant the writ of certiorari and resolve the Constitutional question presented in the petition herein.

Respectfully submitted,

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PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Supplemental Brief for Petitioner, With Appendix, To Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were mailed by United States mail, with first class postage prepaid, to Mr. Jack Emory Farley, Mr. Kevin Michael McNally, Ms. M. Gail Robinson, Office of Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, counsel for respondent, and that all parties required to be served have been served, all on this April ____, 1981.

J. Gerald Henry
Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

No. 79-3752

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEITH E. LUCEY - - - - *Petitioner-Appellee,*

v.

WILLIAM SEABOLD, Superintendent, Blackburn Correctional Complex, - *Respondent-Appellant.*

Appeal from the United States District Court for the Eastern District of Kentucky.

Decided and Filed April 2, 1981.

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

The Court delivered a PER CURIAM opinion. JONES, Circuit Judge (p. 3), delivered a separate dissenting opinion.

PER CURIAM. This is an appeal from the United States District Court for the Eastern District of Kentucky which entered a writ of habeas corpus on petition of appellee Lucey who claimed deprivation of his right to effective assistance of appellate counsel.

The facts in this case show that Lucey's retained counsel had perfected his appeal and had filed the necessary record and briefs but the Court of Appeals of Kentucky had dismissed his appeal because he had failed to follow the requirement of Kentucky Rule of Appellate Procedure 1.095

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(a)(1) which includes the requirement that the pleadings in the Court of Appeals must contain "[t]he same information as required in a statement of appeal in the Supreme Court pursuant to RAP 1.090."

There is no question, of course, but that the Court of Appeals has a perfect right to demand that such a document be prepared and filed. Two questions, however, might be considered as arising: 1) whether Lucey's lawyer had been guilty of ineffective assistance of counsel within our *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir. 1974), rule and 2) whether the case should be remanded to the District Court to take testimony on the question of whether, as claimed by appellee Lucey, the dismissal of his appeal violated equal protection since no such action had been taken on any other case under similar facts.

Study of this record convinces this court that this case should be remanded to determine the equal protection issue set forth immediately above.

This case is ordered remanded for such purpose with power to take any needed testimony.

JONES, Circuit Judge, dissenting. It is an important duty of counsel to ensure that his client has an opportunity to present his claims at an appeal of right. Appellate counsel's failure to comply with Kentucky's Rule of Appellate Procedure 1.095(a)(1), causing the dismissal of the appeal without a consideration of the merits, is *ineffective* assistance of counsel violative of due process. *Gilbert* v. *Sowders,* No. 79-3597 (6th Cir. April 2, 1981) (per curiam) (Jones, concurring. *See also Anders* v. *California,* 386 U. S. 745 (1967); *Benoit* v. *Wingo,* 423 F. 2d 880, 883 (6th Cir. 1970). Consequently, I would affirm the judgment of the district court granting Seabold's petition for writ of habeas corpus.

No. 79-3597

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL DUANE GILBERT, - - *Petitioner-Appellee,*

v.

DEWEY SOWDERS, Superintendent, Kentucky State Penitentiary, - *Respondent-Appellant.*

Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed April 2, 1981.

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

The Court delivered a PER CURIAM opinion. JONES, Circuit Judge, (pp. 3-8) delivered a separate concurring opinion.

PER CURIAM. In this case Warden Sowders appeals from a District Judge's decision granting defendant Gilbert's petition for writ of habeas corpus after the District Court determined that he had been denied his constitutional right to effective assistance of counsel during the appeal of his Kentucky conviction for kidnapping.

This proceeding arises from a situation where retained counsel violated a highly technical procedural rule which resulted in Gilbert's case being dismissed.

Counsel had performed every requirement of the Kentucky appellate rules, except one. He had petitioned for an extension of 60 days for filing the record on appeal while there was time for the extension to be granted. The rules allowed such a 60-day extension. Actually, the extension had been granted by the order, but had not been entered by the clerk of court. Gilbert's counsel's[1] technical violation was that he failed to insure that the order was timely entered as is required by the Kentucky case law.

Kentucky has, of course, a right to enforce its own rules of procedure, including the unusual requirement that the lawyer see to it that the clerk performs his public obligation.

We cannot, however, avoid the conclusion that the failure of the Kentucky Supreme Court to grant appellant's counsel's motions for reconsideration of the dismissal of the appeal was arbitrary and carpicious, and an abuse of due process of law, as protected by the United States Constitution. By these motions the Supreme Court had been fully advised as to the obviously sincere attempt to perfect an appeal and the miniscule nature of the defect. Appellant had been sentenced to sentences totaling 105 years. Kentucky's Constitution grants such a person a direct appeal to the Supreme Court of Kentucky. Ky. Const. § 110 (2)(b).

The judgment of the District Court granting the writ is affirmed.

JONES, Circuit Judge, concurring. I concur in the judgment that Kentucky's incarceration of Daniel Duane Gilbert violates the United States Constitution. I write separately

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[1]Gilbert's counsel at this juncture was the attorney who had been retained for his trial and who undertook the Kentucky Supreme Court appeal without compensation. His counsel on this federal appeal is Kentucky's public defender.

because I believe that the majority misconceives the issue presented by this case.

I

Gilbert was convicted of attempted kidnapping, wanton endangerment in the first degree, two counts of first-degree robbery, kidnapping and first-degree rape. On December 2, 1976, he was sentenced to 105 years imprisonment. A notice of appeal was filed on December 10, 1976. Gilbert, an indigent, was appealing *in forma pauperis* with the volunteer assistance of trial counsel.

Kentucky's rules of procedure require that the record on appeal be filed within sixty days of the filing of the notice of appeal, unless the trial court by order extends the time an additional sixty days.[1] Though the clerk of the trial court and the court reporter actually prepare the transcript

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[1] "Rule CR 73.08 Filing Record on Appeal

The record on appeal as provided in Rules 75 and 76 shall be filed with the appellate court within 60 days after the date of filing the notice of appeal except that when more than one appeal is taken from the same judgment the trial court may prescribe the time for filing, which in no event shall be less than 60 days after the date of filing the first notice of appeal. In all cases the trial court in its descretion and with or without motion or notice may extend the time for filing the record on appeal, if its order for extension is made before the expiration of the period for filing as originally prescribed or as extended by a previous order, but the trial court shall not extend the time to a day more than 120 days after the date of filing the first notice of appeal. The appellate court in its discretion may upon proper motion and a showing of good cause extend the time for filing the record on appeal if the motion for extension is made before the expiration of the period for filing as originally prescribed or as extended by a previous order." (Effective July 1, 1976.)

of record and of evidence[2], respectively, Gilbert's appellate counsel has the responsibility to file the record.[3] When it became obvious that the trial court clerk could not prepare and transmit the record to the appellate court by February 8, 1977, Gilbert's appellate counsel filed a motion and order for an extension. This motion for an extension of time was filed on February 4, 1977, before the expiration of the initial sixty-day period as required by Rule CR 73-08. However, the order of the trial court granting the extension of time for filing the record on appeal was not timely dock-

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[2]"Rule 75.07 Record to be Prepared and Transmitted by Clerk

(1) The clerk of the trial court shall prepare and certify the entire record on file in his office, other than depositions not read in evidence, in accordance with the requirements of RAP 1.110 to 1.120. Such original record shall include the designations or stipulations of the parties as to evidence and proceedings stenographically reported and any statement by the appellant of the points on which he intends to rely. A certified copy of the civil docket assigned to the action may be provided in lieu of the original.

(2) The transcript or parts thereof filed as provided in Rule 75.02 shall be certified by the clerk as a part of the record on appeal.

(3) An original exhibit, when designated, shall be certified by the clerk as part of the record on appeal, but physical exhibits other than documents shall not be transmitted to the appellate court unless requested on its own motion or on the motion of any party.

(4) The matter certified under the provisions of subsections (1), (2) and (3) of this Rule shall constitute the record on appeal and shall be transmitted by the clerk to the appellate court. It is the responsibility of the appellant to cause the record to be filed within the time specified."

[3]"Rule 1.070 Perfecting Appeals

(a) To perfect an appeal the appellant shall:

(1) Cause the record on appeal to be filed."

(Effective July 1, 1976.)

eted, even though lodged by counsel with the clerk.[4] On February 22, 1977, the trial court entered a *nunc pro tunc* order extending the deadline for filing the record. The record was filed on March 21, 1977.

On April 19, 1977, the state moved for dismissal of Gilbert's appeal because the trial court's order extending the filing deadline was void. Thus, the state argued that the record on appeal was untimely filed. The Kentucky Supreme Court dismissed Gilbert's appeal on May 18, 1977. A motion to reconsider was denied.

Gilbert filed a motion in the trial court to reinstate his appeal. On February 2, 1978, his motion was granted. Gilbert refiled his notice of appeal and both sides thoroughly briefed the case. Again, the Kentucky Supreme Court dismissed the appeal and Gilbert's motion for reconsideration was denied.

Thereafter, Gilbert filed a petition for writ of habeas corpus in the Western District of Kentucky. He alleged that his appellate counsel's failure to comply with Kentucky's rules of appellate procedure, causing the dismissal of his appeal, violated his right to effective assistance of counsel. The district court granted the writ. Kentucky appeals.

II

Gilbert's appellate counsel's motion for an extension of time was timely filed. However, by February 8, 1977, the last day on which to receive an extension, an order grant-

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[4]In Gilbert's appellate brief it is stated that counsel may have failed to have the order granting the extension signed by the Jefferson Circuit Court judge. However, the district court stated that Gilbert's counsel failed to ensure that the order was properly docketed by the clerk of courts. In my view, either fact denies Gilbert of his right of effective assistance of counsel.

ing such had not been docketed. Under Kentucky law, a court's order is effective only after it has been signed by the judge and noted in the docket by the clerk. *Commonwealth of Kentucky* v. *Greer Brothers and Young*, 548 S. W. 2d 167 (Ky. App. 1977); *Murrell* v. *City of Hurstbourne Acres*, 401 S. W. 2d 60 (Ky. App. 1966). Thus, appellate counsel's failure to ensure that the clerk performed his duty to docket the order granting the extension resulted in the dismissal of Gilbert's appeal. Gilbert's appeal was dismissed pursuant to Kentucky's rules of procedure.

The majority's opinion holds that "Kentucky has a right to enforce its own procedural rules." However, the majority's opinion also holds that it is "arbitrary and capricious" for the Kentucky Supreme Court to deny Gilbert's motion for reconsideration. In my view, the denial of Gilbert's motion to reconsider is "arbitrary and capricious" only if it "did not have a real and substantial relation to the ends sought to be attained." *Isaac* v. *Engle*, No. 78-3488 (6th Cir. December 12, 1980) (en banc) (Jones, concurring). If, as stated by the majority, "Kentucky has a right to enforce its own procedural rules," thereby dismissing Gilbert's appeal, then Kentucky also has a right to deny motions to reconsider the dismissal. The denial of the motion to reconsider makes final the dismissal. To label appellate counsel's failure to comply with Kenutcky's rules of procedure as "miniscule" does not alter this conclusion. For these reasons, I would resolve this case as it was presented in the briefs and at oral argument.

III

It is well settled that Gilbert, an indigent, cannot be denied assistance of counsel on an appeal of right. *Ross* v. *Moffitt*, 417 U. S. 600 (1974); *Douglas* v. *California*, 372 U. S. 353 (1962). Thus, the questions to be decided are:

(1) whether appellate counsel must render Gilbert *effective* assistance; and (2) whether counsel's failure to obtain an extension of time causing the dismissal of Gilbert's appeal is ineffective assistance of counsel.

A trial counsel's obligations are well established. The plain language of the Sixth Amendment requires that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have assistance of counsel for his defense." This command of the Constitution has been interpreted to mean *effective* assistance of counsel. *Glasser* v. *United States,* 315 U. S. 60 (1942). *Effective* assistance of counsel during criminal prosecutions is also "within the intendment of the due process of law clause" of the Fourteenth Amendment, *Powell* v. *Alabama,* 287 U. S. 53, 66 (1932); *Reece* v. *Georgia,* 350 U. S. 85, 89-90 (1955). The reasons trial counsel must render *effective* assistance are not difficult to fathom. As aptly stated by Justice Rehnquist:

> The purpose of the trial stage from the state's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the state employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt.

Ross, 417 U.S. at 610. The assistance of counsel required under the Fourteenth Amendment is "counsel reasonably likely to render and rendering reasonably effective assistance," *Beasley* v. *United States,* 491 F. 2d 687, 689 (6th Cir. 1974). If a trial attorney improperly exercises his discretion, the assistance of counsel rendered is constitutionally defective. Thus, an attorney must investigate all apparently substantial defenses, advise his client properly

on clear points of law, and develop strategy and tactics which lawyers of ordinary training and skill consider competent. *Id. See also, Michel* v. *Louisiana,* 350 U. S. 91, 101 n. 7 (1950). "Basic procedural errors are also considered in determining whether assistance of counsel has been constitutionally adequate." *Beasley,* 491 F. 2d at 693. Most significantly, *Beasley* holds that trial counsel *"must* assert defenses in a proper and timely manner." *Id.* at 696 (emphasis added).

Both reason *and* precedent require that the right to *effective* counsel extend to appeals of right. Though "there are significant differences between the trial and appellate stages of a criminal proceeding." *Ross,* 417 U. S. at 610, appellate review has become an integral part of the system for finally adjudicating the guilt or innocence of a defendant. *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956). In an appeal of right, the critical issue is "whether there has been a correct adjudication of guilt in every case." *Ross,* 417 U. S. at 615. Effective appellate counsel is necessary if appellate courts are to perform their assigned function. Therefore, the *Beasley* standard that counsel render reasonably effective assistance is applicable on appeals of right, *Benoit* v. *Wingo,* 423 F. 2d 880, 883 (6th Cir. 1970); *See also, Anders* v. *California,* 386 U. S. 738, 745 (1967). To hold otherwise would undermine the well-recognized purpose to granting, albeit gratuitously, an appeal of right.

It is well settled in this Circuit that trial counsel's failure *to perfect* an appeal is a denial of due process. *Boyd* v. *Cowan,* 519 F. 2d 182 (6th Cir. 1975); *Woodall* v. *Neal,* 442 F. 2d (sic) (6th Cir. 1971). Similarly, appellate counsel's failure to perform procedural duties necessary to *prosecute* an appeal is a denial of due process. *See, Benoit, supra.* Thus, appellate counsel's failure to obtain an extension of time to file a record on appeal denied Gilbert due process of law. Such a ruling will not have an unduly

burdensome effect on the administration of state appellate courts. Private as well as professional disciplinary procedures are effective tools to police repetitive attorney misconduct. Nor does such a ruling provide appellants any incentive to encourage less than full compliance with procedural rules to perfect appeals. The writ of habeas corpus is granted only if the state appellate court decides not to hear the appeal.

The harmless error rule is not applicable where a denial of effective assistance of counsel is found. *Beasley,* 491 F. 2d at 696. *Compare, McKeldin* v. *Rose.* No. 80-1198 (6th Cir. October 8, 1980) (per curiam). Consequently, the merits of Gilbert's state appeal of right need not be examined.

For the above stated reasons I concur in the judgment AFFIRMING the district court.

No. 80-1277

APR 16 1981
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - - - Petitioner

versus

JAMES H. BROWN III - - - - - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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April 15, 1981

WESTERFIELD-BONTE CO., 618 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Whether respondent was denied his rights to equal protection and due process guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when the Kentucky Supreme Court dismissed his direct appeal without a hearing on the merits after denying his appointed counsel's timely request for an extension of time which was necessitated by his heavy workload?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii–iv

CONSTITUTIONAL PROVISIONS INVOLVED.... 1

COUNTERSTATEMENT OF THE CASE 1–14

SUMMARY OF ARGUMENT 14–16

REASONS FOR DENYING THE WRIT OF CERTIORARI 17–31

Contrary to the Suggestion of the Petitioner, the Decision of the Sixth Circuit Court of Appeals Is Factually Correct and Based Upon Substantial and Controlling Legal Precedent of This Court.

A. Equal Protection Rationale 17–31

B. Due Process Rationale 31

C. Final Remarks 31

CONCLUSION..... 32

PROOF OF SERVICE 33

TABLE OF AUTHORITIES

Cases:

PAGE

Anders v. *California*, 386 U. S. 738 (1967) . . 4, 8, 11, 26–27
Anderson v. *Charles*, ___ U. S. ___, 100 S. Ct. 2180 (1980) 18
Cleaver v. *Bordenkircher*, 634 F. 2d 1010 (6th Cir. 1980) 17, 18, 20, 21, 22, 28, 31
Dorszynski v. *United States*, 418 U. S. 424 (1974) . . 18
Douglas v. *California*, 372 U. S. 353 (1963) 11, 26
Dowd v. *United States ex rel. Cook*, 340 U. S. 206 (1950) 30
Entsminger v. *Iowa*, 386 U. S. 748 (1967) 26
Griffin v. *Illinois*, 351 U. S. 12 (1956) 25–26
Henry v. *Mississippi*, 319 U. S. 433 (1965) 29
Jenkins v. *Anderson*, ___ U. S. ___, 100 S. Ct. 2124 (1980) 18
Parrot v. *City of Tallahassee, Florida*, 381 U. S. 129 (1965) 29
Ross v. *Moffitt*, 417 U. S. 600 (1974) 17, 22, 25
Sandstrom v. *Montana*, 442 U. S. 510 (1979) 18
Thomas v. *State*, 242 N. E. 2d 919 (Ind. 1969) 27–28
United States ex rel. Smith v. *Twomey*, 486 F. 2d 736 (7th Cir. 1973) 30–31
Wainwright v. *Sykes*, 433 U. S. 72 (1977) 20

Constitutional Provisions:

Fourteenth Amendment 11, 15
Ky. Constitution § 36 (1850) 24
Ky. Constitution § 110 (1976) 23
Ky. Constitution § 115 11

Statutes:

PAGE

CR 6.02 ..... 2, 11
CR 76.12(4)(c) 13
KRS Chapter 31 24
RAP 1.230 2
RAP 1.260(b) 29
RAP 1.450(a) 2, 11

Periodicals:

EC2-30, Code of Professional Responsibility: Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1158 (1958) 10, 24

Murrell, *Justice for the Client and Lower Malpractice Rates For All, A Suggestion For Appellate Procedural Reform, Kentucky Bench and Bar* 12 (January, 1978) 29

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1277

STEVE SMITH, Superintendent, Kentucky State Reformatory - - - - *Petitioner*

v.

JAMES H. BROWN III - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the United States Constitution.

COUNTERSTATEMENT OF THE CASE

References are either to the Joint Appendix filed in the Court of Appeals for the Sixth Circuit (JA) or to the Appendix to the petition for a writ of certiorari (A).

Following his conviction for murder in Mason County, Kentucky Circuit Court and sentencing to twenty years in prison, respondent James H. Brown III filed a timely Notice of Appeal to the Kentucky Supreme Court. On November 5, 1976 the trial judge granted Brown leave to proceed on appeal in forma pauperis and counsel McNally of the Office of Public Defender was appointed to represent him. The record on appeal was timely filed February 14, 1977. On March 16, 1977 Brown filed a timely request for an extension of time of thirty days to file his appellate brief (JA, 7). Brown requested an additional thirty day period in which to submit his brief pursuant to Kentucky Rules of Appellate Procedure (hereinafter RAP) 1.230 and 1.450(a) and Kentucky Civil Rule (hereinafter CR) 6.02, which states in pertinent part:

> CIVIL RULE 6. TIME
>
> CR 6.02 Enlargement
>
> When by statute or by these Rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order . . .

As grounds for the requested extension Brown through his appointed counsel McNally stated, *inter alia:*

3. Undersigned counsel has not been able to do the necessary research and drafting in order to file appellant's brief within the required period. During and immediately prior to the briefing period, undersigned counsel has submitted briefs to this Court and the Court of Appeals on February 1, 1977; February 3, 1977; February 7, 1977; February 14, 1977; February 21, 1977; February 24, 1977; March 1, 1977; March 9, 1977; and two petitions for rehearing on March 10, 1977. In addition, undersigned counsel, during the briefing period, participated in oral argument before this Court on February 16, 1977, submitted two lengthy Motions for Bail Pending Appeal to the Court of Appeals on February 8, 1977 and March 2, 1977; submitted two motions for bail pending appeal in the lower courts on February 24, 1977 and March 3, 1977. In addition, undersigned counsel has, during the extension period, research and prepared a motion under RCr 11.42 which will be filed in the Franklin Circuit Court this week.

4. Undersigned counsel appreciates this Court's demand that the procedural time periods on appeal not be taken lightly. Undersigned counsel requests this extension only because he has no alternative. The workload enumerated in paragraph three, which does not include the numerous other tasks assigned to counsel, simply did not permit undersigned counsel time in which to adequately review the record, research and prepare arguments to submit to this Court.

5. Undersigned counsel does candidly state to this Honorable Court that it could have theoretically been possible to file the brief in the above-styled case within the briefing period. However, in order

> to have accomplished this task, it would have been necessary to request extensions of time for many of the ten (10) briefs filed within the last forty-four (44) days. Many of these briefs were facing deadlines which this Court and the Court of Appeals have indicated are *FINAL*. Undersigned counsel has decided to request an extension of time because of caseload considerations but also because of considerations of judicial economy and efficiency. Undersigned counsel has requested only *three* extensions of time from any appellate court since January 13, 1977, thus substantially reducing the undesirable and time consuming drain on appellate court energies. Undersigned counsel has attempted to marshall his time in such a way as to benefit the majority of his clients as well as to benefit the appellate courts of this Commonwealth (JA, 8-9).

Brown cited *Anders* v. *California,* 386 U. S. 738 (1967), in support of his motion (JA, 9). The Commonwealth of Kentucky did not respond to this motion. On March 30, 1977, the Supreme Court of Kentucky granted a "final extension to and including April 15, 1977, for filing briefs" (JA, 9). On April 15, 1977, Brown, represented by undersigned counsel McNally, requested an additional extension of time of seventeen days, to and including May 2, 1977, in which to file the brief on appeal (JA, 9-10). As grounds for this motion, Brown stated, *inter alia:*

> 2. During the requested extension period undersigned counsel has submitted two lengthy briefs to this Court in murder cases on March 29, 1977 and

April 4, 1977. In addition, undersigned counsel has also submitted a lengthy "Motion for Enlargement of Time for Filing The Brief on Appeal or, in the Alternative, Motion for Clarification of the Status of Appellant's Appeal" on March 29, 1977. Also, undersigned counsel has submitted two briefs to the Court of Appeals on April 8, 1977, and April 11, 1977, as well as participating in oral arguments on April 6, 1977 and April 13, 1977.

3. Appellant is free on bail pending appeal. This is a very significant factor to undersigned counsel, as it must be to this Court. Undersigned counsel was and is fearful that requesting the initial, and now another extension of time in which to file the brief might be seen as tactics of delay. It is not. Undersigned counsel has no wish to try the patience of this Court in any case, but most especially not in a situation where the client is free on bond pending appeal. Undersigned counsel has struggled to file this brief within the requested extension period. However, it could not be done.

4. Because of the workload enumerated above, *and because of the nature of this case* undersigned counsel has not been able to complete the necessary research and drafting of appellant's brief within the requested period. Substantial work has been completed in the preparation of the brief. Nineteen potential errors have been identified in the record on appeal. Five have been identified (thus far) as not worthy of argument. Four arguments have been completed, except for minor revisions. Those allegations of error are, in brief:

I.

Refusal of the trial court to permit the defense to have independent expert analysis of crucial evidence.

II.

Refusal of the trial court to permit the defense a continuance of one to three days in which to prepare to cross-examine a *suprise* prosecution expert who employed a new blood identification theory of a highly complicated nature whose testimony forms the only real evidence against appellant.

III.

Failure of the trial court to grant appellant's motion for a directed verdict.

IV

Failure of the trial court to follow the mandatory sentencing procedures of KRS 532.050.

Other issues which will probably be raised (depending on the results of further research) on appeal include, but are not limited to: (1) an indictment which does not charge a crime; (2) introduction of hearsay, incriminating statements by appellant's co-indictee who did not testify; (3) improper closing argument employing use of "probabilities" of guilt which have no basis in fact, the evidence at trial, or in any scientific theory of probability; (4) a defective murder instruction; (5) failure to instruct on lesser included offenses; and (6) refusal to grant a change of venue.

5. In addition to allowing time for typing and printing of appellant's brief, there is one reason why an extension of seventeen (17) days is required in which to file appellant's brief. One argument which was not mentioned above and which will be raised on appeal is the introduction, over objection, of the testimony of Dr. Robert Charles Shaler at trial. [Transcript of Evidence, pp. 128-134, 136-140, 148-165]. Dr. Shaler was a *surprise* expert witness who testified that blood on appellant's boots was not appellant's despite the fact that the blood on the boots and appellant's blood were both type "A" blood. Dr. Shaler is the major (and possibly only) exponent of a new theory of blood identification called "G.M. Blood Grouping." To Dr. Shaler's knowledge, this test has been introduced in only one prior case in the United States. Trial counsel objected to Dr. Shaler's testimony on the basis that the test has not been proven accurate or reliable. (This allegation of error is to be distinguished from the defense request for a continuance). Undersigned counsel is having some difficulty researching the reliability of this novel procedure because of the paucity of published material. The record reveals two articles by Dr. Shaler: "Individualization of Forensically Important Physiological Fluids" (unpublished, which deals with his test) and "Simultaneous Electrophoresis of Peptidose A, Phosphoglucomatose, and Adeny Late Kinase" (published, which apparently does not relate to Dr. Shaler's new test). Obviously, this subject matter is highly complex and additional time is needed to present an argument to this court with clarity and accuracy. This issue is of extreme importance to

> this appeal because Dr. Shaler's testimony was the principal basis for appellant's conviction.
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> 6. Hopefully, it is clear from the above that this request for an extension of time is *not* due to "general conditions of counsel practice." Undersigned counsel begs this Court to grant this extension of seventeen (17) days to insure an adequate appellate brief (JA, 10-12; emphasis in original).

Brown again cited *Anders* in his motion and argued that the requested extension was necessary in order to complete a competent, professional appellate brief (JA, 12). The Commonwealth filed no response to the extension motion. On May 2, 1977, Brown tendered an 85 page brief raising eleven allegations of error, nine of which were alleged to be violations of constitutional magnitude (JA, 12). The issues raised in Brown's brief, as stated therein, are as follows: failure to prove the elements of the offense, improper admission of evidence of novel "blood grouping" theory, failure to grant a continuance when a surprise expert was called, denial of request to produce evidence for scientific analysis, failure to grant a change of venue, improper admission of hearsay testimony, improper "probability" closing argument by the prosecutor, failure to instruct the jury on second degree manslaughter, fatally defective indictment, admission of testimony

about evidence without establishing chain of custody, and improper sentencing.[1]

On May 18, 1977, sixteen (16) days *after* Brown's brief was tendered to the Supreme Court of Kentucky, the Court denied without comment Brown's motion for an extension of time in which to file the brief (JA, 14). On May 31, 1977 Brown filed a lengthy "Motion and Affidavit for Enlargement of Time for Filing the Brief on Appeal" (JA, 14-15). Brown repeated the previously enumerated justifications for the requested extension and also *swore*:

> Undersigned counsel respectfully asks this Court to recognize the fact that he is proceeding in good faith and has, considering the limitations outlined above, diligently prosecuted this appeal. Furthermore, undersigned counsel wishes to impress upon this Court that he has devoted no time (with the exception of one motion for certificate of probable cause in a case filed by his predecessor) to litigation in the federal courts. His time has been almost exclusively spent in handling direct appeals to this Court and the Court of Appeals (JA, 14).
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> * * * *
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> In the case at bar another extremely important factor must be considered. The undersigned counsel is a public defender who represents indigent

[1]Petitioner notes in his petition that Brown has never claimed constitutional error at his state trial in federal court (Petition For a Writ of Certiorari, hereinafter P, 5, 14). Of course, any federal attack on Brown's conviction would be premature at this time. Brown must first litigate his right to a state court appeal. However, Brown does assert numerous serious constitutional violations at his trial.

defendants on appeal to this court. Unlike the attorney in private practice, the undersigned counsel lacks the ability to decline to represent an indigent appellant simply because he already has a large volume of work.

Under Canon 2 of the Code of Professional Responsibility, "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The negative implications of that canon require that "[e]mployment should not be accepted by a lawyer when he is unable to render competent service." EC 2-30, Code of Professional Responsibility. "The lawyer deciding whether to undertake a case must be able to judge objectively whether he is capable of handling it and whether he can assume its burdens without prejudice to previous commitments." Professional *Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1158, 1218 (1958). Unfortunately, this ethical alternative is not actually available to the public defender attorneys representing indigents on appeal since there are many more appellants requiring assistance of counsel on appeal than there are available appellate defender counsel.

Consequently, the undersigned counsel, like other members of the appellate division of the Office of Public Defender, may be required to assume a larger volume of work than he would normally accept under other circumstances. As a result, the undersigned counsel may be ethically required to seek extensions of time for filing an appellate pleading in one case so that he may devote sufficient time to completing an appellate brief for a different defendant (JA, 14-15).

Brown raised various other arguments, describing the impending denial of effective assistance of counsel and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Section 11 of the Kentucky Constitution (JA, 15). Additionally, Brown noted that no prejudice had resulted to the Commonwealth from his request for an extension of time (JA, 15), and that even if the Kentucky Supreme Court believed appointed counsel McNally was engaging in dilatory and unprofessional tactics the sanction against the innocent appellant was misplaced (JA, 15). The Commonwealth did not dispute appointed counsel's *sworn* claims and in fact did not even file a response to the motion. On June 30, 1977, the Kentucky Supreme Court denied Brown's motion without comment (JA, 15).

On July 11, 1977, Brown moved the Supreme Court of Kentucky pursuant to RAP 1.345(b), RAP 1.450(a) and CR 6.02, to reconsider its most recent order (JA, 15). He relied upon *Anders; Douglas* v. *California,* 372 U. S. 353 (1963), and Section 115 of the Kentucky Constitution which guarantees the right to an appeal (JA, 15). On September 13, 1977, Brown's "Motion to Reconsider . . . and Motion for Oral Hearing of Motion" was denied without comment and despite the absence of opposition or response from the Commonwealth (JA, 15-16).

On September 19, 1977, the Attorney General moved to dismiss Brown's appeal, moved to relieve himself of the obligation to file a brief, and moved to

affirm Brown's conviction (JA, 16). The Commonwealth did not cite any authority for the requested relief, nor did it dispute any of Brown's counsel's claims or demonstrate any prejudice. On September 29, 1977, Brown filed a response opposing the dismissal of the appeal on various federal constitutional grounds previously alluded to and requesting an oral hearing to help resolve "the very important issues before" the Court (JA, 16). In the alternative, undersigned counsel McNally moved the Court to permit him to withdraw as counsel of record and for appointment of substitute counsel for Brown who would be permitted to file a timely brief on his behalf (JA, 16). The same date Brown filed a *pro se* motion requesting similar relief and also requesting leave to file his own *pro se* brief on appeal (JA, 16).

On October 5, 1977, the Kentucky Supreme Court overruled Brown's counsel's motions, ignored his *pro se* motion and dismissed his appeal without comment (JA, 16).

Petitioner has adequately described the procedural history of Brown's journey into federal court, then into state court and back to federal court (P, 5-7). However, it should be noted that the Attorney General filed a response to the initial Magistrate's Report which recommended denial of federal relief because of the availability of relief for Brown under Rule of Criminal Procedure (RCr) 11.42 in Kentucky and asserted that Brown had not exhausted his state remedies (JA, 37). When Brown thereafter filed his RCr 11.42 motion, the Commonwealth filed a brief response

stating that the Mason Circuit Court could grant relief if it found that counsel McNally had been ineffective (JA, 67-68). The trial judge entered an order granting Brown a belated appeal to the Kentucky Supreme Court after conducting two hearings at which counsel for the Attorney General failed to appear (JA, 74). Then, in spite of its responses to the Magistrate's report and the RCr 11.42 motion, the Attorney General filed an untimely[2] "Notice of Cross-Appeal" from the Mason Circuit Court's order (JA, 72).

Petitioner also notes that Brown tendered an 85 page brief the first time and a 46 page brief the second time (P, 5, 18). However, effective January 1, 1978 the Kentucky Supreme Court adopted CR 76.12(4)(c) which requires that the brief for appellant in that court not exceed 50 pages. Prior to that date no page limitation on briefs for appellants had existed. While a brief longer than 50 pages may be filed with leave of the court, Brown was unwilling to request such leave because of the history of his first aborted appeal. Despite the fact that all briefs were timely filed in Brown's second appeal, the Kentucky Supreme Court again dismissed his appeal based on the original failure of counsel to file a timely brief in the first appeal.

Finally, the Commonwealth's response to Brown's motion to reconsider his case and to issue the writ of habeas corpus included no request for a hearing on Brown's claims of denial of equal protection and effec-

[2]This "cross-appeal" violated numerous civil and criminal rules. See Brown's Motion to Dismiss Cross-Appeal filed in the Kentucky Supreme Court April 5, 1978.

tive assistance of counsel (JA, 75-76). After the Magistrate recommended that Brown be granted a belated appeal or, alternatively, a new trial, the Attorney General in his particularized objections included a one sentence alternative request for an evidentiary hearing *solely* on the issue of effective assistance of appellate counsel (JA, 92).

As petitioner has related, the district court on June 25, 1979 issued the writ of habeas corpus (JA, 97-98). The Commonwealth appealed that Court's judgment to the Sixth Circuit Court of Appeals which affirmed it on October 31, 1980 (A, 27-33).

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit Court of Appeals in respondent Brown's case is factually correct and based on substantial and controlling legal precedent of this Court. The Sixth Circuit held that Brown was denied equal protection when his direct appeal to the Kentucky Supreme Court was dismissed without a hearing after that Court denied the timely motion of Brown's public defender for an additional seventeen days to file his appellate brief when that motion was necessitated by appointed counsel's workload. The Sixth Circuit held alternatively that Brown was denied his due process right to the effective assistance of appellate counsel.

Petitioner challenges Brown's counsel's workload claims for the first time before this Court. The Sixth Circuit noted that those claims were uncontested. The

Commonwealth never disputed counsel's sworn assertions in state or federal court despite countless opportunities to do so in person or by means of pleadings and did not even petition the Sixth Circuit for a rehearing of its decision. Now the Commonwealth attempts to challenge counsel's statements in this Court by vague innuendo years after the fact. Such sandbagging is obviously improper.

The heart of this case is that if Brown had been represented by retained counsel his appeal would never have been dismissed. Why? Because private attorneys are able and in fact ethically required to accept only as many cases as they can competently handle while Brown's public defender had no control over his careload and was required to accept more cases than he could process without requesting extensions of time. Brown's appointed counsel's attempt to withdraw as counsel of record was denied by the Kentucky Supreme Court. Brown's *pro se* requests for appointment of substitute counsel or leave to file a *pro se* brief were likewise denied. Thus Brown was denied the only direct appeal he was guaranteed by Kentucky's Constitution solely because of his indigency which constitutes a clear denial of equal protection of law as guaranteed by the Fourteenth Amendment.

Petitioner has not cited a single precedent, state or federal, outside of Kentucky, where a court has held that an indigent criminal appellant's appeal may be dismissed because his appointed attorney is too overworked to file a timely brief. Kentucky's views on this subject are clearly an unconstitutional aberration,

and the Sixth Circuit's decision in Brown's case will have only narrow ramifications. A grant of certiorari is not appropriate because the significance of this case is limited to Kentucky practice and is soundly based on numerous previous decisions of this Court. The issue is simply not of plenary national significance as suggested by petitioner. The Commonwealth at this late date, seeks to reopen a factual inquiry which is long since closed. The United States Supreme Court is certainly not the appropriate place to do so.

Finally, contrary to the Attorney General's contention, no legitimate state interest will be undermined by the decision in Brown's case. The Attorney General demonstrated no prejudice when he moved to dismiss Brown's appeal, and the Kentucky Supreme Court gave no reason for denying Brown's extension motion sixteen days *after* he tendered his brief for subsequently (months later) dismissing Brown's appeal or for subsequently (almost a year later) dismissing Brown's timely second appeal. Kentucky's ability to enforce its valid procedural rules will not be undercut by the Sixth Circuit's decision in Brown's case. If any court, state or federal, believes an attorney has acted improperly, that attorney, rather than his indigent client, can and should suffer the consequences. There is no substantial state interest at stake here.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Contrary to the Suggestion of the Petitioner, the Decision of the Sixth Circuit Court of Appeals Is Factually Correct and Based Upon Substantial and Controlling Legal Precedent of This Court.

A. EQUAL PROTECTION RATIONALE

Citing *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir. 1980), which it stated presented the identical issue, the Sixth Circuit Court of Appeals affirmed the district court's judgment in Brown's case for the reasons enunciated in *Cleaver* (A, 27). In *Cleaver* the Court held that the indigent defendant was denied equal protection since he was represented on appeal by a public defender so overworked that he was unable to file a timely brief on the defendant's behalf (A, 31-32). That court noted that appointed counsel's assertions about his excessive workload had not been contested by the Commonwealth of Kentucky (A, 31-32). The Court concluded that because an affluent defendant who sought to retain an overburdened lawyer "could and would have hired another" the indigent defendant was deprived of equal protection since he was denied the right to appeal granted others by Kentucky's Constitution (A, 32). The Sixth Circuit relied on *Ross* v. *Moffitt,* 417 U. S. 600 (1974).

Petitioner now claims that Brown was not deprived of equal protection of law (P, 17-23). He urges that since the Sixth Circuit's opinion in Brown's case "set

out no facts" to show an equal protection violation "it cannot stand unless there is a due process right to state-court appeal" (P, 17). He contends that any overwork was "because of the exercise of appellate counsel's own independent judgment" (P, 18). He refers to Brown's claim of denial of equal protection in his habeas corpus petition was "secondary" (P, 18-19). He advances the notion that the record does not show "without dispute" that Brown was denied an appeal while wealthier defendants would have had one because he claimed in federal court that Brown "was in no way singled out" (P, 19). Basically, while the Commonwealth *never contested* in either state or federal court Brown's appointed counsel's claims that he needed additional time to file his brief because he was overworked,[3] it now seeks to challenge the decision of the Sixth Circuit on that ground.

Throughout the lengthy course of these proceedings the Attorney General has relied almost exclusively on

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[3]It should be noted that the Commonwealth did not even petition the Sixth Circuit Court of Appeals for rehearing after it issued its decisions in *Cleaver* and *Brown* holding that the workload claims of appointed counsel were uncontested. As a general rule, this Court will not consider contentions not presented to the court below. *See, e.g., Dorszynski* v. *United States,* 418 U. S. 424, 431 n. 7 (1974); *Jenkins* v. *Anderson,* ____ U. S. ____, 100 S. Ct. 2124, 2127 n. 1 (1980); *Anderson* v. *Charles,* ____ U. S. ____, 100 S. Ct. 2180, 2181 n. 1 (1980); *Sandstrom* v. *Montana,* 442 U. S. 510 (1979).

Moreover, while the Commonwealth states that in oral argument before the Sixth Circuit it noted that a hearing "could include an examination into claims of workload" (P, 19-20), the Sixth Circuit said in *Cleaver* that the state did not dispute the public defender's claims regarding workload in briefing *or argument before it* (A, 31).

its argument that there is no due process right to effective assistance of counsel on appeal and ignored the crux of this case. What happened in this case is that Brown's appeal was dismissed by the Kentucky Supreme Court *on account of Brown's indigency.* Because Brown was indigent he had to be represented by the public defender's office which was incredibly overworked at that time. Brown's public defender, undersigned counsel McNally, simply could not prepare and file all the appellate briefs which he was assigned without requesting some extensions of time. He had filed ten appellate briefs in less than six weeks when he requested the first thirty day extension (JA, 8-9). He had filed four more appellate briefs and a lengthy motion and participated in two oral arguments when he asked for the second extension of seventeen days (JA, 10). Moreover, he had completed four of the arguments for Brown's brief and begun researching seven more, one of which involved a novel and highly complex issue (JA, 11-12).

Brown's public defender, whose office could not refuse to represent indigent appellants, simply had so much other work to do that he was unable to complete Brown's brief in the initial thirty day extension period. *Had Brown been represented by a private attorney who had control over his caseload, his brief would no doubt have been timely filed.* That is the heart of this case.

It is incredible that the Attorney General should challenge appointed counsel's workload claims at this late date. Years ago when counsel in pleadings before

the Kentucky Supreme Court first swore to his inability to complete Brown's brief in the allotted time because of overwork, the Attorney General was silent. In all the proceedings before the federal district court, the Mason Circuit Court and again before the Kentucky Supreme Court he did not dispute counsel's sworn statements. Even before the Sixth Circuit he was mum on this point. Yet now, years after the fact, he chooses to dispute counsel's claims on the basis of speculation and innuendo. Surely this is sandbagging at its worst. *See Wainwright* v. *Sykes,* 433 U. S. 72 (1977).

The unpersuasiveness of petitioner's arguments is striking. Of course, the Sixth Circuit is not required to list the specific facts in Brown's case which demonstrate an equal protection violation (P, 17); it may properly refer to the opinion in *Cleaver,* a case where the facts relevant to its legal conclusion are identical. The notion that counsel was overworked because he simply chose to do "almost double the amount of research and work for the first defaulting brief" (P, 18) hardly deserves comment. The change in Kentucky's procedural rules made it necessary that the appellate brief be shorter. Moreover, counsel was not so overburdened at the time he filed the second brief and thus he was able to fine-tune his arguments. Finally, the "authority" on the obscure topic which Brown's counsel had so much difficulty researching and which the Attorney General claims he tendered (P, 18) was not on point. The suggestion that appointed counsel spent

time doing unnecessary research or drafting for the original brief is unfair.

Petitioner's contention that Brown's equal protection claim was "secondary" in his habeas corpus petition is absurd. It was his first assertion of constitutional error (JA, 4) and he briefed it extensively in his memorandum of law (JA, 17-22). Brown is puzzled by petitioner's argument that the record is in dispute about whether a wealthier defendant would have had an appeal while Brown did not because the Attorney General stated in his objections to the magistrate's report that Brown was not "singled out" (P, 19). The problem was not that Brown was "singled out" but that he was one of a number of defendants unfortunate enough to be represented by public defenders too overworked to file all the briefs they were assigned without requesting extensions of time.

Petitioner launches an all-out assault on both the Sixth Circuit's decisions in *Cleaver* and in *Brown* and on this Court's opinions about the rights of indigents with respect to state court appeals (P, 16-22). This Court is accused of authoring "a generation of imprecise and ambiguous opinions" on that topic (P, 16) and causing "Constitutional haziness" (P, 22), and the Sixth Circuit is described as speaking with "Constitutional uncertainty", allegedly pleading with this Court "to resolve the matter" while at the same time supposedly fearing reversal of its decision (P, 20).

In fact this Court's teachings on the rights of indigents in the state appellate and post-conviction processes have been quite clear. As the Sixth Circuit

emphasized, quoting *Ross* v. *Moffitt*, 417 U. S. at 606-607:

> The cases encompassed a variety of circumstances but all had a common theme.
>
> * * *
>
> [T]hey stand for the proposition that a state cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons (A, 32).

The Sixth Circuit simply followed the mandates of *Ross* in deciding Brown's case. The *Cleaver* decision is thorough and well-reasoned. Contrary to petitioner's contentions the Court does not "seem uncertain" of its decision. In fact, the Court confidently based its decision on two rationales — equal protection and due process.

Petitioner's blatant misrepresentation of the federal district court's opinion requires comment. Petitioner claims that the district court was not "impressed with the secondary claims of appellate counsel's workload" and found it just as likely that counsel chose to ignore the Kentucky Supreme Court's plain directive as that he was overworked (P, 19). In fact the district court did not reach the equal protection issue (A, 41-43). The remark to which petitioner refers occurs in a footnote where the court notes the tenacity of counsel in their attempts to obtain an appeal for Brown "whether that error be the product of overwork, as was alleged in their motions for extension of time below, or a tacit decision to ignore a plain direc-

tive of the Kentucky Supreme Court" (A, 42). The court properly drew no conclusion about the issue it did not reach.

A very basic flaw in petitioner's reasoning is that he bases his argument on the notion that Kentucky did not deny Brown equal protection because "there has been no showing that Kentucky left the appeal door open for more affluent persons who *"did not follow its rules"* (P, 21; emphasis added). Brown's public defender's problem was not that he *did not* follow the rules; his extension motion was timely, procedurally correct and advanced good cause. The problem was that he *could not* file the numerous briefs that were his responsibility without requesting additional time to file some of them. His situation was not, therefor, analogous to a private attorney's, and the "appeal door" was left open for the clients of retained counsel who could control their caseloads but not for Brown whose appointed counsel could not.

Some background on the situation that existed at the time Brown's appeal was first dismissed may be helpful. In 1976, Kentucky enacted a new constitutional article pertaining to the judiciary. Among many changes, a new intermediate appellate court (the Court of Appeals of Kentucky) was created. Kentucky Constitution Section 111 (1976). The previous "Court of Appeals" became the Supreme Court of Kentucky. Kentucky Constitution Section 110 (1976). That Court's traditional backlog of cases was substantially reduced by the transfer of pending cases to the new Court of Appeals and by the new discretionary

nature of its jurisdiction. *Id.* Obviously, the Supreme Court began to hear cases more quickly. Unfortunately, this additional court increased the workload of the Public Defender. The Kentucky Office of Public Defender (now Office for Public Advocacy) which was (and still is) in its infancy (created in 1972) did not keep pace with the judicial branch in expansion of facilities and personnel. *See* KRS Chapter 31. One reason for this is that the Public Defender obtains funding from the taxpayer's reprsentatives — the legislature, which only meets every two years. Kentucky Constitution Section 36 (1850). It is also generally recognized that many citizens (and their representatives) are not inclined to appropriate funding (adequate or otherwise) to provide appeals for "convicted criminals." As the Kentucky Supreme Court began to hear appeals more rapidly, the Court also began to deny motions for extensions of time by appellate public defenders. In these cases, the Court began to dismiss appeals without a hearing on the merits. This is not an isolated case, but is one of a series of dismissals under identical circumstances.

As argued to the Supreme Court of Kentucky, the Canons of Ethics forbid a lawyer from accepting employment if he already has committed himself to other cases. EC2-30, *Code of Professional Responsibility: Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1158, 1218 (1958). Unfortunately, the appellate public defender in Kentucky does not have this option. He is forced by the system to accept an abnormally large caseload. The public defender

must fulfill his ethical responsibility by seeking extensions of time *where necessary to adequate representation.*

The Kentucky Public Advocate's Office handles most (if not all) of the indigent appeals from criminal convictions in the Commonwealth. Therefore, because counsel has no control over his caseload, delays in processing appeals are sometimes inevitable. The only alternative the appellate public defender has to requesting an extension of time from the appellate court is to file a perfunctory brief. This alternative "remedy" to the problem facing the appellate public defender is no solution at all. It violates yet another constitutional guarantee of the indigent appellant—the effective assistance of appellate counsel.

In the present case, counsel was forced to subject himself to the Hobson's choice of rendering ineffective assistance of counsel by filing a perfunctory brief or, on the other hand, causing the indigent appellant to lose his right to appeal by failing to file a brief within the otherwise reasonable time limits set by the Kentucky Supreme Court. Since a criminal appellant represented by retained counsel would not be subjected to such peril, there has been in the present case a clear denial of equal protection of the law as guaranteed by the Fourteenth Amendment.

In the past twenty years, this Court has given "extensive consideration to the rights of indigent persons on appeal." *Ross* v. *Moffitt, supra,* 417 U. S. at 605. The seminal case is, of course, *Griffin* v. *Illinois,* 351

U. S. 12 (1956), where the requirement of the equal protection clause was simply and powerfully stated:

> *There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Id.,* 351 U. S. at 19; emphasis added.

In *Douglas* v. *California, supra,* the rationale of *Griffin* was extended to appeals. Echoing *Griffin,* the Court stated:

> . . . there can be no equal justice where the kind of *appeal* a man enjoys "depends on the amount of money he has." (*Douglas* v. *California,* 372 U.S. at 355; emphasis added; quoting *Griffin* v. *Illinois,* 351 U. S. at 19.)

Finally, two cases decided on May 8, 1967, are directly applicable. In *Anders* v. *California, supra,* and *Entsminger* v. *Iowa,* 386 U. S. 748 (1967), the indigent appellant was initially provided with counsel on appeal. However, in both cases the indigent's counsel withdrew *(Anders)* or abandoned the appeal *(Entsminger).* This Court announced the critical holding that appointed counsel's failure to prosecute the appeal cannot work to deprive the indigent of his right to an appeal. This Court sought to establish procedures which "would merely afford the . . . [indigent] that advocacy which a non-indigent defendant is able to obtain." *Anders* v. *California,* 386 U. S. at 745. This Court stated:

> This procedure will assure penniless defendents the same rights and opportunities on appeal — as nearly as is practicable — as are enjoyed by those

> persons who are in a similar situation but who are able to afford the retention of private counsel.

Because of Brown's indigent status, he was appointed counsel who could not, in effect, file a timely brief. The Attorney General argues that this procedure is constitutionally permissible. In fact, the Commonwealth would have this Court believe that appointment of any counsel (no matter how incompetent, ill or otherwise incapable of filing a brief) is enough to satisfy the equal protection clause. Surely, *Anders* demonstrates the fallacy in the Commonwealth's argument.

The Sixth Circuit concluded that Brown's request for an additional extension of time to file the brief was necessary because of the workload of his public defender. The Supreme Court of Indiana has also demonstrated an admirable sensitivity to this rationale. In *Thomas* v. *State,* 242 N. E. 2d 919 (Ind. 1969), the Court stated:

> We wish to make it clear that we do not hold or intend to imply that the public defender was incompetent or acted in an improper manner. Confronted with twice the normal case load, he may well have done all that he possibly had time to do for the appellant. If he did so, he properly performed the duties of his office. On the other hand, *the appellant's rights can not be determined by the case load of the public defender.* It is reversible error not to provide a defendant in a criminal prosecution with adequate legal representation at each stage of the proceeding, regardless of the cir-

> cumstances which cause the public defender's office to become overloaded. If the public defender was too busy to adequately represent each of his clients, the court should have appointed other counsel to assist him in carrying out his responsibilities. (*Id.* at 925; emphasis added).

Both undersigned counsel McNally and Brown, acting pro se, specifically requested the Kentucky Supreme Court to appoint counsel for Brown who would be able to file a timely brief. Brown actually asked for leave to file his own pro se brief. The denial of these motions by the Kentucky Supreme Court is further evidence of a violation of constitutional magnitude.

Brown submits that contrary to petitioner's contentions, there simply is no valid state interest at stake in the present case. The *discretionary* penalty of Kentucky's rule which permits dismissal of an appeal for an appellant's failure to file a timely brief should not be used as vehicle for preventing a convicted criminal defendant from obtaining appellate review of his conviction. As pointed out in the Brief in Opposition filed in the companion case, *Bordenkircher* v. *Cleaver* (File No. 80-1278) at 17-21, a number of alternative remedies are available for violation of a valid procedural rule of a state appellate court. Kentucky's chosen remedy —punishing the client for the attorney's mistake—is

logically and constitutionally as unnecessary as it is inappropriate.[4]

In *Henry* v. *Mississippi,* 319 U. S. 433 (1965), this Court explained that:

> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest . . . If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights. *Id.,* 319 U. S. at 447-448.

Because counsel's motion for extension was procedurally proper, timely, and advanced "good cause" for the requested relief, the forfeiture under RAP 1.260(b) of appellant's right to appeal could serve no legitimate state interest. *Cf. Parrot* v. *City of Tallahassee, Florida,* 381 U. S. 129 (1965). Significantly, in each case dismissed by the Kentucky Supreme Court under identical circumstances, never has the motion to dismiss or the order dismissing the appeal demon-

[4]The Legal Malpractice Insurance Committee of the Kentucky Bar Association has proposed an alternative to dismissal of the client's appeal for procedural errors. The Committee advocates the imposition of fines, arguing that the fines would be effective in enforcing court rules and would be cheaper than malpractice suits. The proposed rule changes have been rejected by the Kentucky Supreme Court. Sixty-six (66%) percent of those responding to a recent Kentucky Bar Association poll "favor a system of fines for the attorney rather than dismissal of the cause." Laura L. Murrell, *Justice For The Client and Lower Malpractice Rates For All, A Suggestion for Appellate Procedural Reform, Kentucky Bench and Bar* at 12 (January, 1978).

strated prejudice to the Commonwealth or stated a rationale for the drastic relief requested or ordered.

It is obvious that there was no legitimate state interest at stake when Brown requested an additional seventeen day extension of time to file a brief in an extraordinarily complex case. The fact that the Kentucky Supreme Court did not deny his motion until sixteen days *after* Brown tendered his lengthy brief is further evidence. It is impossible to rationalize the dismissal of Brown's appeal as necessary to protect a valid state interest. State officials, even judicial officers, cannot, under these circumstances, invoke rules (which generally serve a valid state interest) which result in the denial of the indigent's right to appeal. *See Dowd* v. *United States ex rel Cook,* 340 U. S. 206 (1950), where otherwise valid prison rules prevented Mr. Dowd from sending out his appeal papers.

Finally, perhaps the Attorney General might at least admit that the words of the Seventh Circuit in *United States ex rel. Smith* v. *Twomey,* 486 F. 2d 736, 739 (7th Cir. 1973), are meaningful:

> To avoid federal intervention in future cases involving inordinate delays in processing state indigent appeals, the Chief Judge of the Circuit Court of Cook County (and, if necessary, the County Board) should ensure prompter filing of appellate briefs by the Public Defender of Cook County and by the State's Attorney of Cook County, even if appropriate personnel need be added to their staffs. . . . The rights announced in Griffin v. Illinois, . . . and Douglas v. Cali-

> fornia . . . cannot be allowed to become meaningless through understaffing of the state offices responsible for assuring those rights.

B. DUE PROCESS RATIONALE

The alternative rationale of the Sixth Circuit—that Brown was denied the effective assistance of appellate counsel—is adequately discussed in the Brief in Opposition filed in the companion case, *Bordenkircher* v. *Cleaver* (File No. 80-1278).

C. FINAL REMARKS

The decision of the Sixth Circuit in Brown's case is consistent with and in fact required by applicable decisions of this Court. Contrary to petitioner's claims (P, 23-24), the issue presented by this case is not "of plenary national importance." Petitioner has *never* cited any case where a court, state or federal, other than the Kentucky Supreme Court, has dismissed a criminal appeal because an indigent appellant's counsel was too overworked to file a timely brief. Thus the ramifications of the Sixth Circuit's decision are very limited. This case is not appropriate for review on writ of certiorari pursuant to Rule 17 of this Court.

CONCLUSION

For the reasons stated in this Brief, respondent Brown respectfully requests this Court to deny the petition for a writ of certiorari filed in his case.

Respectfully submitted,

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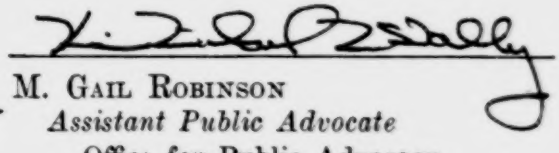
PROOF OF SERVICE

I, M. Gail Robinson, co-counsel of record for respondent, hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition were served on petitioner by mailing those copies, U. S. postage prepaid, to petitioner's counsel, Hon. J. Gerald Henry, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601 on April 15, 1981.



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